SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1401

THE UNITED STATES OF AMERICA, APPELLANT

vs.

JAMES HOFFMAN

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

INDEX

1 In the District Court of the United States for the District of Columbia

Misc. No. 161

IN RE JAMES HOFFMAN

[File endorsement omitted.]

Petition for the institution of criminal contempt proceedings
Filed Feb. 27, 1946

1. Complainant Chester Bowles is a citizen of the United States and is the Administrator of the Office of Price Administration stationed in Washington, D. C., with offices at Federal Office Building No. 1, 2d and C Streets Southwest.

2. The respondent, James Hoffman, was at all times hereinafter mentioned a dealer in used passenger automobiles, trading under the firm name and style of Allen Motors at 316 Florida Avenue Northeast, in the District of Columbia.

3. Jurisdiction of this action is conferred upon this Court by Title 11, Section 324, District of Columbia Code of Laws (1940 Edition).

4. On, to wit, the 11th day of May 1945, there was entered in Civil Action No. 28054 in the District Court of the United States for the District of Columbia, a decree for a final injunction, a copy of which is annexed hereto as "Exhibit A," which decree has remained in full force and effect at all times hereinafter mentioned, and which decree enjoined the respondent, James Hoffman, his agents, employees, servants, and all other persons in active concert or participation with any of them from (1) selling, delivering, or offering to sell or deliver used passenger automobiles at prices in excess of the maximum prices established therefor by Maximum Price Regulation 540 or by any other regulation establishing maximum prices for said commodities, (2) doing or omitting to do any other act in violation of Maximum Price Regulation 540 or of any other regulation establishing maximum prices for used passenger automobiles, and (3) offering, soliciting, attempting, or agreeing to do any of the foregoing.

5. Complainant charges as follows:

A. On, to wit, October 23, 1945 respondent, James Hoffman, wilfully and knowingly sold and delivered a 1942 Plymouth
2 4-door Sedan, Model P14, to one Seymore Daniels for the sum of $1,600.00 although the lawful maximum price therefor was $998.60 "as is" and $1,248.00 warranted. At the time of said sale and at all times subsequent thereto respondent failed and

omitted to furnish the purchaser with a written warranty as required by the provisions of Section 7 of Maximum Price Regulation 540. Thereby respondent wilfully violated the provisions of Maximum Price Regulation 540 and wilfully violated the provisions and restraints of the aforesaid decree for a final injunction.

B. On, to wit, November 7, 1945, respondent, James Hoffman, wilfully and knowingly sold and delivered a 1941 Dodge 4-door Sedan, Model D19, to one Heazy Luss for the sum of $1,500.00, although the lawful maximum price therefor was $794.60 "as is" and $1,218.00 warranted. At the time of said sale and at all times subsequent thereto respondent failed and omitted to furnish the purchaser with a written warranty as required by the provisions of Section 7 of Maximum Price Regulation 540. Thereby respondent wilfully violated the provisions of Maximum Price Regulation 540 and wilfully violated the provisions and restraints of the aforesaid decree for a final injunction.

C. On, to wit, December 22, 1945, respondent, James Hoffman, wilfully and knowingly sold and delivered a 1941 Chevrolet 2-door Town Sedan to one J. A. Sommerville for the sum of $1,325.00 although the lawful maximum price therefor was $868.40 "as is" and $1,086.00 warranted. At the time of said sale and at all times subsequent thereto respondent failed and omitted to furnish the purchaser with a written warranty as required by the provisions of Section 7 of Maximum Price Regulation 540. Thereby respondent wilfully violated the provisions of Maximum Price Regulation 540 and wilfully violated the provisions and restraints of the aforesaid decree for a final injunction.

D. On, to wit, November 8, 1945, respondent, James Hoffman, wilfully and knowingly sold and delivered a 1941 Plymout 4-door Sedan, Model P12-Spec. DeLuxe, to one Franklin Brown for the sum of $1,150.00 although the lawful maximum price therefor was $863.60 "as is" and $1,079.00 warranted. At the time of said

3 sale and at all times subsequent thereto respondent failed and omitted to furnish the purchaser with a written warranty as required by the provisions of Section 7 of Maximum Price Regulation 540. Thereby, respondent wilfully violated the provisions of Maximum Price Regulation 540 and wilfully violated the provisions and restraints of the aforesaid decree for a final injunction.

E. On, to wit, November 27, 1945, respondent, James Hoffman, wilfully and knowingly sold and delivered a 1941 Pontiac 4-door Sedan, Model L8JA, to one Terrell H. Pick for the sum of $1,254.00 although the lawful maximum price therefor was $955.40 "as is" and $1,194.00 warranted. At the time of said sale and at all times subsequent thereto respondent failed and omitted to furnish the purchaser with a written warranty as required by the provisions of

Section 7 of Maximum Price Regulation 540. Thereby respondent wilfully violated the provisions of Maximum Price Regulation 540 and wilfully violated the provisions and restraints of the aforesaid decree for a final injunction.

F. On, to wit, December 15, 1945, respondent, James Hoffman, wilfully and knowingly sold and delivered a 1941 Dodge DeLuxe 4-door Sedan, Model D19, to one Frankford Coker for the sum of $1,683.00 although the lawful maximum price therefor was $1,003.40 "as is" and $1,254.00 warranted. At the time of said sale and at all times subsequent thereto respondent failed and omitted to furnish the purchaser with a written warranty as required by the provisions of Section 7 of Maximum Price Regulation 540. Thereby respondent wilfully violated the provisions of Maximum Price Regulation 540 and wilfully violated the provisions and restraints of the aforesaid decree for a final injunction.

G. On, to wit, December 11, 1945, respondent, James Hoffman, wilfully and knowingly sold and delivered a 1941 Buick 41-41 4-door Sedan to one Lewis J. Lamp for the sum of $1,600.00 although the lawful maximum price therefor was $1,080.40 "as is" and $1,350.00 warranted. At the time of said sale and at all times subsequent thereto respondent failed and omitted to furnish the purchaser with a written warranty as required by the provisions of Section 7 of Maximum Price Regulation 540. Thereby respondent wilfully violated the provisions of Maximum Price Regulation 540 and wilfully violated the provisions and restraints of the aforesaid decree for a final injunction.

4 H. On, to wit, November 29, 1945, respondent, James Hoffman, wilfully and knowingly sold and delivered a 1941 DeSoto DeLuxe 4-door Sedan to one Lavonia Claytor for the sum of $1,700.00 although the lawful maximum price therefor was $1,046.60 "as is" and $1,308.00 warranted. At the time of said sale and at all times subsequent thereto respondent failed and omitted to furnish the purchaser with a written warranty as required by the provisions of Section 7 of Maximum Price Regulation 540. Thereby respondent wilfully violated the provisions of Maximum Price Regulation 540 and wilfully violated the provisions and restraints of the aforesaid decree for a final injunction.

6. Complainant charges as follows:

A. On, to wit, October 23, 1945, respondent, James Hoffman, acting by and through his duly authorized agent, wilfully and knowingly sold and delivered a 1942 Plymouth 4-door Sedan, Model P14, to one Seymore Daniels for the sum of $1,600.00 although the lawful maximum price therefor was $998.60 "as is" and $1,248.00 warranted. At the time of said sale and at all times subsequent thereto respondent failed and omitted to furnish the purchaser with a written warranty as required by the provisions of

Section 7 of Maximum Price Regulation 540. Thereby respondent wilfully violated the provisions of Maximum Price Regulation 540 and wilfully violated the provisions and restraints of the aforesaid decree for a final injunction.

B. On, to wit, November 7, 1945, respondent, James Hoffman, acting by and through his duly authorized agent, wilfully and knowingly sold and delivered a 1941 Dodge 4-door Sedan, Model D19, to one Heazy Luss for the sum of $1,500.00 although the lawful maximum price therefor was $794.60 "as is" and $1,218.00 warranted. At the time of said sale and at all times subsequent thereto respondent failed and omitted to furnish the purchaser with a written warranty as required by the provisions of Section 7 of Maximum Price Regulation 540. Thereby respondent wilfully violated the provisions of Maximum Price Regulation 540 and wilfully violated the provisions and restraints of the aforesaid decree for a final injunction.

5 C. On, to wit, December 22, 1945, respondent James Hoffman, acting by and through his duly authorized agent, wilfully and knowingly sold and delivered a 1941 Chevrolet 2-door Town Sedan to one J. A. Sommerville for the sum of $1,325.00 although the lawful maximum price therefor was $868.40 "as is" and $1,086.00 warranted. At the time of said sale and at all times subsequent thereto respondent failed and omitted to furnish the purchaser with a written warranty as required by the provisions of Section 7 of Maximum Price Regulation 540. Thereby respondent wilfully violated the provisions of Maximum Price Regulation 540 and wilfully violated the provisions and restraints of the aforesaid decree for a final injunction.

D. On, to wit, November 8, 1945, respondent, James Hoffman, acting by and through his duly authorized agent, wilfully and knowingly sold and delivered a 1941 Plymouth 4-door Sedan, Model P12-Spec. DeLuxe, to one Franklin Brown for the sum of $1,150.00 although the lawful maximum price therefor was $863.60 "as is" and $1,079.00 warranted. At the time of said sale and at all times subsequent thereto respondent failed and omitted to furnish the purchaser with a written warranty as required by the provisions of Section 7 of Maximum Price Regulation 540. Thereby respondent wilfully violated the provisions of Maximum Price Regulation 540 and wilfully violated the provisions and restraints of the aforesaid decree for a final injunction.

E. On, to wit, November 27, 1945, respondent, James Hoffman, acting by and through his duly authorized agent, wilfully and knowingly sold and delivered a 1941 Pontiac 4-door Sedan, Model L6JA, to one Terrell H. Pick for the sum of $1,254.00 although the lawful maximum price therefor was $955.40 "as is" and $1,194.00 warranted. At the time of said sale and at all times subsequent

thereto respondent failed and omitted to furnish the purchaser with a written warranty as required by the provisions of Section 7 of Maximum Price Regulation 540. Thereby respondent wilfully violated the provisions of Maximum Price Regulation 540 and wilfully violated the provisions and restraints of the aforesaid decree for a final injunction.

6 F. On, to wit, December 15, 1945, respondent, James Hoffman, acting by and through his duly authorized agent, wilfully and knowingly sold and delivered a 1941 Dodge DeLuxe 4-door Sedan, Model D19, to one Frankford Coker for the sum of $1,683.00 although the lawful maximum price therefor was $1,003.40 "as is" and $1,254.00 warranted. At the time of said sale and at all times subsequent thereto respondent failed and omitted to furnish the purchaser with a written warranty as required by the provisions of Section 7 of Maximum Price Regulation 540. Thereby respondent wilfully violated the provisions of Maximum Price Regulation 540 and wilfully violated the provisions and restraints of the aforesaid decree for a final injunction.

G. On, to wit, December 11, 1945, respondent, James Hoffman, acting by and through his duly authorized agent, wilfully and knowingly sold and delivered a 1941 Buick 41-41 4-door Sedan to one Lewis J. Lamp for the sum of $1,600.00 although the lawful maximum price therefor was $1,080.40 "as is" and $1,350.00 warranted. At the time of said sale and at all times subsequent thereto respondent failed and omitted to furnish the purchaser with a written warranty as required by the provisions of Section 7 of Maximum Price Regulation 540. Thereby respondent wilfully violated the provisions of Maximum Price Regulation 540 and wilfully violated the provisions and restraints of the aforesaid decree for a final injunction.

H. On, to wit, November 29, 1945, respondent, James Hoffman, acting by and through his duly authorized agent, wilfully and knowingly sold and delivered a 1941 DeSoto DeLuxe 4-door Sedan to one Lavenia Claytor for the sum of $1,700.00 although the lawful maximum price therefor was $1,046.60 "as is" and $1,308.00 warranted. At the time of said sale and at all times subsequent thereto respondent failed and omitted to furnish the purchaser with a written warranty as required by the provisions of Section 7 of Maximum Price Regulation 540. Thereby respondent wilfully violated the provisions of Maximum Price Regulation 540 and wilfully violated the provisions and restraints of the aforesaid decree for a final injunction.

7 Wherefore, complainant charges that the respondent, James Hoffman, deliberately, wilfully, knowingly, and unlawfully violated the provisions of the decree of this Court entered

on May 11, 1945, and thereby committed a criminal contempt of the authority of this Court and, therefore, complainant prays:

(1) That this Court issue a Rule to Show Cause to be served upon the respondent, or other appropriate process, to bring him before the Court.

(2) That this Court appoint attorneys to prosecute the charge of criminal contempt on behalf of the United States and this Honorable Court.

(3) That the Court fix a date for a hearing on the charge of criminal contempt.

(4) That the Court impose a sentence of fine or imprisonment or both upon the respondent, James Hoffman, in the event that the Court shall find him guilty of contempt.

CHESTER BOWLES,
By J. Grahame Walker,
J. GRAHAME WALKER,
District Enforcement Attorney.

[*Duly sworn to by J. Grahame Walker; jurat omitted in printing.*]

8 *Exhibit "A" to Petition*

In the District Court of the United States for the District of Columbia

Civil Action No. 28054

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, PLAINTIFF

v.

JAMES HOFFMAN, DEFENDANT

Consent decree for final injunction

This matter came before the Court for pretrial at this term of Court, and it appearing to the Court that the parties have consented to the issuance of this decree without findings of fact or conclusions of law, it is by the Court, this 11th day of May 1945,

Adjudged, ordered, and decreed that the defendant, James Hoffman, his agents, employees, servants, and all other persons in active concert or participation with any of them, jointly and severally, be and they hereby are permanently restrained from engaging in or causing any of the following acts or omissions to act:

1. Selling, delivering, or offering to sell or deliver used passenger automobiles at prices in excess of the maximum prices established therefor by Maximum Price Regulation 540 or by any other regulation establishing maximum prices for said commodities.

2. Doing or omitting to do any other act in violation of Maximum Price Regulation 540 or of any other regulation establishing maximum prices for used passenger automobiles.

3. Offering, soliciting, attempting, or agreeing to do any of the foregoing.

(S) F. DICKINSON LETTS, *Justice.*

We consent:

(S) David Riordan,
DAVID RIORDAN,
Attorney for Defendant,

(S) Carl W. Berueffy,
CARL W. BERUEFFY,
District Enforcement Attorney,

(S) J. Grahame Walker,
J. GRAHAME WALKER,
Assistant Enforcement Attorney,

(S) F. L. Williamson,
F. L. WILLIAMSON,
Assistant Enforcement Attorney,
Attorneys for Plaintiff,
Office of Price Administration,
5601 Connecticut Avenue NW.

10 In the District Court of the United States for the District of Columbia

[Title omitted.]
[File endorsement omitted.]

Rule to show cause

Filed Feb. 27, 1946

Upon consideration of the verified petition filed in this Court, it is by the Court this 27th day of February 1946,

Ordered that the respondent, James Hoffman, be and he hereby is directed to appear before this Court in the Motions Court at 10 o'clock a. m. on the first Monday occurring at least five days after the service of a copy of this Rule and of the Petition upon him and show cause, if any he has, why he should not be adjudged to have committed criminal contempt of this Court because of his disobedience of the decree for a final injunction entered in Civil Action No. 28054 on May 11, 1945.

ALEXANDER HOLTZOFF, *Justice.*

11 In the District Court of the United States for the District of Columbia

[Title omitted.]
[File endorsement omitted.]

Order appointing attorneys

Filed Feb. 27, 1946

This cause coming on to be heard at this term, it is by the Court this 27th day of February 1946,

Ordered that Hon. Edward M. Curran, United States Attorney for the District of Columbia, and J. Grahame Walker, District Enforcement Attorney be, and they hereby are, appointed as attorneys to prosecute the criminal charges contained in the petition filed herein on behalf of the Court and of the United States.

ALEXANDER HOLTZOFF, *Justice.*

12 In the District Court of the United States for the District of Columbia

[Title omitted.]
[File endorsement omitted.]

Motion to dismiss rule to show cause

Filed Sept. 23, 1946

Comes now the Respondent in the above-entitled cause by his attorneys and moves this Honorable Court to dismiss the Rule to Show Cause issued hereinbefore and for grounds therefor states:

That said rule was issued as a result of transactions revealed by books, papers, contracts, agreements, and documents, produced by the said Respondent in accordance with a subpoena duces tecum issued by the Office of Price Administration against said Respondent, and received by said Office of Price Administration after Respondent specifically claimed immunity against self-incriminating testimony as guaranteed by the Fifth Amendment to the Constitution, and the Compulsory Testimony Act (49 U. S. C. A. 46); and that said Respondent may therefore not be subjected to any penalty or forfeiture for or on account of any transaction, matter or

thing, concerning which he produced books, papers, contracts, agreements and documents in obedience to said subpoena.

BUCKLEY & DANZANSKY,
By Bernard Margolius,
BERNARD MARGOLIUS,
Raymond R. Dickey,
RAYMOND R. DICKEY,
Attorneys for Respondent,
315 National Press Building, Washington, D. C.

13 In the District Court of the United States
for the District of Columbia

[Title omitted.]
[File endorsement omitted.]

Affidavit in support of motion to dismiss

Filed Sept. 23, 1946

CITY OF WASHINGTON,
District of Columbia, ss:

James Hoffman, being first duly sworn, under oath deposes and says:

1. That he is the Respondent in the above entitled cause.

2. That he was served on or about the 11th day of January, 1946, with a subpoena duces tecum, issued by Herbert S. Thomson, Acting District Director of the Office of Price Administration for the District of Columbia, said subpoena being dated the 10th day of January 1946, ordering said Respondent to appear at the Office of Price Administration, District Office, before J. Grahame Walker, Enforcement Attorney, to testify concerning sales of used passenger automobiles and to bring with him "any and all records required by the provisions of Section 12 of the Maximum Price Regulation 540 with respect to any and all automobiles purchased, or otherwise acquired, sold, delivered, or otherwise disposed of, from October 1, 1945 to the date of service of this subpoena."

3. That he did so appear before the Office of Price Administration in response to said subpoena duces tecum and was represented by Bernard Margolius as counsel at that appearance.

4. That your affiant did claim orally and in writing all of the immunities from self-incriminating testimony as given by the Fifth Amendment of the Constitution of the United States and given by the Act, commonly known as the Compulsory Testimony Act (49 U. S. C. A., § 46).

5. That notwithstanding this claim, the presiding officer, at said hearing, J. Grahame Walker, did receive the records pro-
14 duced in response to the subpoena duces tecum.

6. That the Rule to Show Cause is based on information of transactions revealed by these records produced in accordance with the subpoena.

7. That your affiant kept these records in the normal course of trade or business.

James Hoffman.
JAMES HOFFMAN.

Subscribed and sworn to before me a Notary Public in and for the District of Columbia this 23rd day of September 1946.

ANNA R. CRAMER,
Notary Public, D. C.

My Commission expires this 31st day of August 1948.

15 In the District Court of the United States for the District of Columbia

[Title omitted.]
[File endorsement omitted.]

Motion to suppress evidence

Filed Oct. 4, 1946

Comes now the Respondent and moves the Court to suppress as evidence, any and all records, documents, papers and testimony, or other evidence disclosed by or obtained as a result of an examination of Respondent's papers, documents, and records, pertaining to any transaction involved or set forth in the Petition to adjudicate Respondent in Contempt of Court, upon which the Rule to Show Cause was based, on the ground that the use of such evidence would be in direct violation of the provisions of the Emergency Price Control Act of 1942, which has incorporated within it the provisions of the Compulsory Testimony Act of 1893 (50 U. S. C. A. § 922), and the Fourth and Fifth Amendments to the Constitution.

BUCKLEY & DANZANSKY,
By Bernard Margolius,
BERNARD MARGOLIUS,
Raymond R. Dickey,
RAYMOND R. DICKEY,
Attorneys for Respondent,
315 National Press Building, Washington, D. C.

16 In the District Court of the United States for the District of Columbia

Misc. 161

OFFICE OF PRICE ADMINISTRATION, PLAINTIFF

vs.

JAMES HOFFMAN, DEFENDANT

Transcript of proceedings

17 *Motion to dismiss*

WASHINGTON, D. C., *October 4, 1946.*

The above-entitled cause came on for hearing before Hon. Alexander Holtzoff, Associate Justice, at 12:20 o'clock p. m.

Appearances: On behalf of the Plaintiff: T. Grahame Walker, Esq., and Robert B. Kennedy, Esq. On behalf of the Defendant: Bernard Margolius, Esq., and Raymond Dickey, Esq.

18 PROCEEDINGS

The COURT. Of what does the alleged contempt consist?

Mr. MARGOLIUS. This is a motion to dismiss a rule to show cause and the petition upon which the rule is based and a motion to suppress evidence which is based on the same ground and which will be determined by the same considerations.

The COURT. My question was: Of what does the alleged contempt consist?

Mr. MARGOLIUS. The contempt consists of an alleged violation of the terms of an injunction, an OPA matter.

The COURT. What is the connection of that motion and the motion to suppress?

Mr. MARGOLIUS. If I may state the position very briefly, it is this: The respondent is under injunction of this Court not to deal in automobiles except in compliance with the regulations of the Office of Price Administration. The respondent was directed by subpoena duces tecum, issued by the Office of Price Administration, to produce all of his records for a period of some months at the Office of Price Administration on the date set.

The COURT. You need not go into detail. I just wanted to orient myself.

Mr. MARGOLIUS. The subpoena was answered and at that time a privilege against self-incrimination was claimed under
19 the Compulsory Testimony Act of 1893 which is incor-

porated int othe Emergency OPA Price Control Act by Section 922 (g).Thereafter these records were used.

Mr. Walker, of the Office of Price Administration, filed a motion with this Court to adjudicate the respondent in contempt of court and we now move to dismiss. It is a violation of the Compulsory Testimony Act——

The COURT. I do not understand the motion to dismiss.

Mr. MARGOLIUS. I filed that this morning for the protection of the respondent to suppress any and all evidence, documents or testimony which might arise from the documents before the Price Administrator.

The COURT. Your motion to suppress, it seems to me, would be premature until the documents have been produced and seized.

Mr. MARGOLIUS. They have been produced.

The COURT. I thought it was to punish your client for failure to furnish.

Mr. MARGOLIUS. The contempt is for violating the decree of this Court in enjoining this defendant from further violation.

The COURT. I think I will take this up after luncheon.

(Thereupon, at 12:30 o'clock p. m., a recess was taken until 1:45 o'clock p. m.)

20 AFTERNOON SESSION

The hearing was resumed at 1:45 o'clock p. m., at the expiration of the recess.

The COURT. You may proceed, Mr. Margolius.

Mr. MARGOLIUS. May it please the Court, as I attempted to summarize before the noon recess, this case comes before you upon a petition filed by the Office of Price Administration asking this Court to adjudicate the respondent, James Hoffman, in contempt of this Court in violating the injunction of this Court and to impose upon him the criminal penalties incident to such a conviction.

The respondent filed a motion to dismiss the rule and the petition upon which it is based as set forth in the motion. Most of it is based upon the alleged inconsistency or violation of the provisions of the Compulsory Testimony Act of 1893 which is incorporated into the Emergency Price Control Act of 1942 by specific reference.

The COURT. Before you enter into the merits of the motion, I am not quite clear why that is a basis, even if the point is well taken, for dismissing the rule. Why is that a ground for dismissing the rule? The original motion is not before me on the merits this afternoon.

Mr. MARGOLIUS. No, sir.

The COURT. You are moving to dismiss the rule to show
21 cause.

Mr. MARGOLIUS. That is right and the petition upon which it is based.

The COURT. It seems to me the ground you allege goes to the merits of the motion on contempt, as I see it at the moment.

Mr. MARGOLIUS. If I may explain to the Court in my argument, I do not believe the facts in the case are in dispute. The Office of Price Administration filed no formal answer to the motion. We understood that and, of course, make no point about it.

The respondent in this case received a subpoena duces tecum to appear at the Office of Price Administration and produce all records required by him to be kept in compliance with Regulation 540 which governs the sale and disposition, purchase and so forth of used automobiles.

That subpoena was answered and at that time the claim of privilege was filed with the Office of Price Administration in writing. After that, the Office of Price Administration filed the present petition with this Court.

Your Honor's point that a motion to dismiss might not lie in this case is answered by a mere reading of the Compulsory Testimony Act of 1893. You must remember that in our motion to dismiss—and as I say I don't think the facts are in dispute—the fact
22 is brought to the attention of the Court that the transactions which are set forth in the position upon which the rule to show cause was issued by this Court were those involved in the records which the Office of Price Administration subpoenaed the respondent to produce and which were produced.

The Emergency Price Control Act, if I may proceed in this fashion, if there is no objection——

The COURT. If you will permit me, I would like to inject a question at this time. I still do not follow your line of argument. As I see it, an injunction was issued against your client to enjoin him from violating certain maximum price regulations and other OPA regulations.

Mr. MARGOLIUS. That is right.

The COURT. Later on, this court issued a rule to show cause why he should not be adjudged guilty of contempt in disobeying the injunction.

Mr. MARGOLIUS. That is right.

The COURT. So the only issue is whether it is a lawful injunction and whether the defendant has obeyed it.

Now, you are moving to dismiss the rule to show cause. It seems to me the motion to dismiss the rule would lie for insufficiency of the petition on the face of it and not on any matter going to the merits of the motion.

Mr. MARCOLIUS. I do not think it is a question of going to
23 the merits. It is like a motion to quash an indictment where you produce evidence to show illegality in the record and not on the face of the record.

The COURT. I am not clear as to what you contend to be the connection between the Compulsory Testimony Act and the alleged violation of this injunction.

Mr. MARCOLIUS. That is the merit of our motion to dismiss.

The COURT. What is your point? Before you argue your matter, I would like to get the points so I can follow your argument better.

Mr. MARCOLIUS. Under the Emergency Price Control Act records have to be kept by any person who is regulated by the law or regulations. The Compulsory Testimony Act is incorporated by law and when you read it is says this:

"No person shall be excused from attending and testifying"—this was originally applied to the Interstate Commerce Commission—"or from producing books, papers, tariffs, contracts, agreements, and documents before the Interstate Commerce Commission"—

The COURT. I am familiar with that.

Mr. MARCOLIUS. Yes. But here is the point that I think permits us to come into the court and ask the Court to do what we ask the Court to do for this relief. After it says he shall respond and be required to produce documents, it says this:

24 "But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena, or the subpoena of either of them."

The COURT. I think I am beginning to follow you. Is your motion then in the nature of a special plea in bar setting up immunity?

Mr. MARCOLIUS. That is it exactly.

The COURT. Is it your contention that because you produced books and papers relating to the transactions complained of that you are not subject to prosecution?

Mr. MARCOLIUS. That is right.

The COURT. Prosecution for contempt?

Mr. MARCOLIUS. Your Honor has our position correct.

The COURT. Now I understand. May I interrupt and ask what your position is, Mr. Walker?

Mr. WALKER. If Your Honor please, there are two questions involved in this case, as I see it; two very narrow questions.

The first one is: Was there any privilege connected with these documents or the production of these documents since they

25 are documents that are required to be kept by the regulation?

Then, if there is no privilege with respect to those documents, is there immunity?

The COURT. What is your position?

Mr. WALKER. Our position is that, in the first instance, there is no privilege and, there being no privilege, there is no immunity.

The COURT. The OPA Act did not repeal the Fifth Amendment of the Constitution.

Mr. WALKER. No; not at all, but these are records that are required by the Act of Congress to be kept for examination by the Office of Price Administration.

The COURT. That does not do away with the privileges of the Fifth Amendment.

Mr. WALKER. No; if there is a privilege here.

The COURT. I do not understand the privilege of the Fifth Amendment does not apply to a record merely because an Act of Congress provides that records shall be kept.

Mr. WALKER. These records, if Your Honor please, are not personal papers such as are protected by the Fifth Amendment. These records are records of which the defendant here is custodian. They are records that are set up for the benefit of the Government.

The COURT. Nobody can require a citizen to work for the Government without compensation. A storekeeper who keeps records keeps those records for himself primarily. They
26 may be open to governmental inspection which is an entirely different proposition.

Mr. WALKER. There are cases on the point which back up our position. These are analogous to corporate records in some respects where the corporation is the custodian and not the owner.

The COURT. Your position is that—I am just trying, and without expressing any agreement or disagreement with your position, to get to what your position is—that because the Emergency Price Control Act requires a businessman to keep certain records, those records become public records as to which the privileges of the Fifth Amendment will not attach?

Mr. WALKER. That is right. They are quasi-public records.

The COURT. Of course, the Davis case has some bearing on it, hasn't it?

Mr. WALKER. The Wilson case also, if Your Honor please.

The COURT. I have in mind the recent Davis case.

Mr. MARGOLIUS. I don't think that is ample. I have studied that.

Mr. WALKER. But the Wilson case has a good deal of bearing on it.

The COURT. What is the citation?

Mr. WALKER. 221 U. S.

The COURT. Isn't that the case which holds a corporation may not take advantage of the Fifth Amendment or the Fourth Amendment?

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Mr. WALKER. Yes.

The COURT. Are these corporate records?

Mr. WALKER. No; these are not corporate records. This case goes further, if Your Honor please, and has language in favor of the position we take.

The COURT. What is your second position?

Mr. WALKER. Then our position is that there being no privilege connected with the records there is no immunity.

The COURT. It all comes down to this, whether the privilege of the Fifth Amendment applies to these records.

Mr. WALKER. That is right.

The COURT. Then there is only one question in the case.

Mr. WALKER. It could be argued perhaps——

The COURT. Is there any controversy over the fact that this prosecution arises out of the same facts concerning which records were produced by the defendant?

Mr. WALKER. That is something I cannot tell but, for the purpose of the argument, I will admit that those records we received and we obtained information from those records.

The COURT. You may proceed.

Mr. MARCOLIUS. I don't believe the issue is as narrow as the Government makes it.

The COURT. There is always a narrow issue in every

28

case.

Mr. MARCOLIUS. This is narrow but a little bit wider than the Government made, we think. We say, regardless of any constitutional protection of the Fifth Amendment or the Fourth Amendment, Congress specifically, in this case, gave them immunity under the Compulsory Testimony Act and I will attempt to develop it as briefly as I can.

If we want to call these records that are required to be kept by a shopkeeper or a storekeeper or an automobile dealer quasi-public, we can call them that as far as we are concerned. We do not care at the moment for the purpose of this argument. If they become quasi-public records under the theory of Mr. Walker and his application of the Wilson case and they are what he calls quasi-public records, they become quasi-public by reason of Section 922 (b) of the Emergency Price Control Act. I would like to refer that to the Court to get a clear understanding of this. This provision provides:

"The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the renting of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to
29 make reports, and he"—meaning the Administrator—"may require any such person to permit the inspection and copying of records and other documents."

The COURT. I am familiar with that. You may paraphrase it.

Mr. MARGOLIUS. That made, in the years 1943 and 1944 before the new amendment and decontrol by the Government, every record kept by every businessman in America a quasi-public record. There was no such thing as a private paper——

The COURT. Yes, I understand all that. If you will come down to the point.

Mr. MARGOLIUS. While providing that in Section 922 (b), we go over to Section 922 (g) and Congress, in the very same section said as follows:

"No person shall be excused from complying with any requirements under this section"—meaning the production of documents—"because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893, shall apply with respect to any individual who specifically claims such privileges."

Mr. Walker is asking this Court to read out of the statute Section 922 (g). That is our position.

There is no case ever decided on one point, unfortunately. However, we say that the statutory provisions are clear.
30 The COURT. I think I get your point.

Mr. MARGOLIUS. We will answer counsel if you would rather hear from him first but our point is just that, that the provision is there and the provision is broader, if the Court please, than a mere privilege against self-incrimination.

The COURT. In other words, you do not depend upon the Fifth Amendment of the Constitution. You rely on the statute.

Mr. MARGOLIUS. That is right.

The COURT. Very well, I get your point.

Mr. WALKER. If Your Honor please, I would like to correct one impression that Mr. Margolius may have inadvertently given the Court. Mr. Margolius read a portion of the Act and stated that that made every record of anyone doing business a quasi-public record, I think he misconstrued that portion of the Act because it simply permitted the Administrator to issue a regulation requiring the keeping of certain records and the only required records were the records named in specific regulations.

The COURT. I do not think that is the important point. The crux of the matter is it is claimed, and I think perhaps that is what you should direct yourself to, that the immunity provision of the Compulsory Testimony Act is expressly carried into the
31 OPA act and that, therefore, by reason of producing these records, James Hoffman becomes immune from prosecution for any violation concerning which those records gave information. What is that section number?

Mr. MARGOLIUS. Title 50, Section 922.

The COURT. What subsection?

Mr. MARGOLIUS. Section 922 (b) and (g).

The COURT. I am referring to the section which carries the Compulsory Testimony Act.

Mr. MARGOLIUS. That is subsection (g).

The COURT. You may proceed, Mr. Walker. That seems to me to be the crux of the case.

Mr. WALKER. Section (g), if Your Honor please, says, "The immunity provisions of the Compulsory Testimony Act of February 11, 1893, shall apply with respect to any individual who specifically claims such privilege."

It is the position of the Office of Price Administration that Congress could not have had in mind requiring the keeping of certain records for inspection by the Government. Obviously, that requirement was intended to ferret out and find violations and Congress just could not have had in mind requiring the keeping of these records for the inspection of the Government and, at the same time, granted immunity if those records were inspected. It does not make sense.

The COURT. What force do you attach to this provision?

32 Mr. WALKER. That provision, if Your Honor Please, grants immunity, as we view it, where there is privilege; privilege and immunity are coterminous, one is not broader than the other. Where there is privilege, he certainly gets immunity under that provision of the statute but, there being no privilege, it naturally follows there would be no immunity.

The COURT. Mr. Margolius, have you the Compulsory Testimony Act?

Mr. MARGOLIUS. Yes, sir.

The COURT. I am going to ask you to develop that a little more, Mr. Walker. When would you say an alleged violator of an OPA regulation would be entitled to benefit from this provision?

Mr. WALKER. When do I say what, if Your Honor please?

The COURT. Under what circumstances would you say an alleged violator of an OPA regulation is entitled to this provision?

Mr. WALKER. Under many circumstances.

The COURT. Will you give me one as an illustration?

Mr. WALKER. Yes; I will give you this identical case. This gentleman was subpoenaed before us and required to bring certain records. The records we asked for were solely the records that were required by the regulation. If, when he appeared, we had interrogated him and we had questioned him and he
33 claimed his privilege, obviously he then would have obtained immunity. We went further than we should have. There is the privilege against oral testimony. There is the privilege, for example, against many records which he might keep and which are not records required by the regulation.

The COURT. In other words, it is your contention that this immunity applies only to those records which the regulations do not require a businessman to keep?

Mr. WALKER. That is correct.

The COURT. But as to any records which a businessman is required to keep by the regulations or by the statute, this immunity provision does not apply?

Mr. WALKER. That is our contention.

The COURT. Where do you find that in the provisions of the Act?

Mr. WALKER. In the provisions of the Act?

The COURT. Yes.

Mr. WALKER. We find nothing with respect to that question other than in Section (g) here except the provisions requiring the keeping of those records.

The COURT. Yes. I understand that there are provisions requiring the keeping of these records. What I want to know is whether you contend there is any foundation in the phraseology of this Act which justifies this limitation which you seek to put upon it.

Mr. WALKER. There is nothing, if Your Honor please, in
34 the Act other than the whole theory of the Act, as I see it.

The COURT. Is there anything in the committee reports or in the legislative history which justified a narrow interpretation which you seek to put upon it?

Mr. WALKER. I know of no such thing, if Your Honor please.

The COURT. Has this precise point ever been passed upon in any court?

Mr. WALKER. The question has been passed on. I think that it is practically the precise case in the case of Bowles against Beatrice Creamery Company and I have that case before me and I will read a portion of it to Your Honor.

The COURT. What is the citation of the case?

Mr. WALKER. 146 Fed. (2d) at page 774.

The COURT. You may proceed.

Mr. WALKER. In that case, if Your Honor please, the Court says this at one point:

"As a means of enforcing a valid law, Congress may require the keeping of records reasonably necessary to that end. To require the keeping of records showing whether there has been compliance with a valid law is an appropriate means to a legitimate end. Such records are quasi-public in character and as to them the privilege against self-incrimination under the Fifth Amendment does not apply."

35 The COURT. Where are you reading from?

Mr. WALKER. Page 779, if Your Honor please. It is the paragraph numbered 1.

The COURT. Yes; I see it.

But the Court was not discussing this Act. It was discussing the privilege embracing the Fifth Amendment.

Mr. WALKER. This was a case which arose under our Act.

The COURT. I understand but I am wondering where the precise point of Mr. Margolius which he is now raising, namely, that under the provisions of the Act under which you are operating he is entitled to immunity, whether that particular point has been passed upon or the point that you are raising, namely, that that immunity provision should be construed narrowly and is applicable only to those records which parties are not required to keep.

Mr. WALKER. I do not think, if Your Honor please, that that point has ever been discussed in the cases except with respect to the applicability of the Fifth Amendment.

The COURT. Mr. Margolius is not relying on the Fifth Amendment because there are cases which hold that the Fifth Amendment does not apply to the situation. I am aware of that.

Mr. WALKER. Yes.

The COURT. Mr. Margolius, however, predicates his position not on the broad features, broad provision of the Fifth

36 Amendment, but on this Act of Congress. Of course, Congress can give and Congress can take away. It can repeal that position next January if it chooses to do so but the question is: Is there any reason why the statute, as Congress enacted it and which appears to be unambiguous, should not be read as it stands?

Mr. WALKER. I think, if Your Honor please, that the case of Heike against the United States is somewhat applicable. That is reported in 227 U. S. at page 131 and in that case our statute was not involved. It was a statute that required the defendant to make reports concerning sugar purchases and that also had an immunity provision in it and this is what Mr. Justice Holmes said:

"Of course there is a clear distinction between an amnesty and the constitutional protection of a party from being compelled in a criminal case to be a witness against himself. Amendment V. But the obvious purpose of the statute is to make evidence available and compulsory that otherwise could not be got. We see no reason for supposing that the Act offered a gratuity to crime. It should be construed, so far as its words fairly allow the construction, as coterminous with what otherwise would have been the privilege of the person concerned. We believe its policy to be the same as that of the earlier act of February 11, 1893,
37 which read, 'No person shall be excused from attending and testifying——

The COURT. Don't bother reading it again.

Mr. WALKER. I am not going to. Then he goes on to say:

"But no person shall be prosecuted, etc., as now, thus showing the correlation between constitutional right and immunity by the form. That statute was passed because an earlier one, in the language of a late case, 'was not coextensive with the constitutional privilege.'"

My contention is that that is exactly the situation here. This statute and this immunity is coextensive with privilege and does not go beyond that.

The COURT. You are asking me to do this: You are asking me to take the plain words of an Act of Congress and to insert a limitation in them by construction. Isn't that what you are trying to ask me to do in a way?

Mr. WALKER. Well, put to me in that fashion, I am asking you to make a limitation which is a reasonable and obvious limitation.

The COURT. You are asking me to say this, that if Congress had this matter called to its attention it probably would have inserted this limitation. I am inclined to agree with you, Mr. Walker, but I am not the legislature.

Mr. WALKER. No; but I think this, if Your Honor please,
38 that in view of this earlier case, this 1912 case, that Congress could very well have had this in mind.

The COURT. They didn't say so. If they had that in mind that is hidden in the recesses of their inner consciousness.

Mr. WALKER. You have got a construction in this case which was precisely the construction that I ask the Court to make in the present case.

The COURT. I get your point.

Mr. WALKER. And, apparently, the Supreme Court, in this case, thought it was a reasonable construction and would be entirely unreasonable, on the one hand to demand records and, on the other hand, to give them immunity as they spoke of it in advance. There is nothing referring directly to the point.

The COURT. I get your position very clearly, Mr. Walker.

Mr. MARGOLIUS. If the Court please, what you say with respect to Section 922 (g) I think is absolutely right.

The COURT. I think I would like to get your comments if you have any on the Heike case.

Mr. MARGOLIUS. That was a corporation case and it was the production of records of a corporation.

The COURT. The passages that Mr. Walker has read might be dicta.

39 Mr. MARGOLIUS. Let's assume it is good law—well, it is good law. That doesn't, however, come under the Emergency Price Control Act of 1942.

The COURT. No; that is not the point. In a statute similar to this one, the Supreme Court in the Heike case inserted this limitation by construction and Mr. Walker asks me to do the same thing with this case.

Mr. MARGOLIUS. I can explain that by the mere reading of Section 922 (g). Mr. Walker is gratuitous when he says if testimony has been given certainly the immunity provisions of the Compulsory Testimony Act would apply but where, in Section 922 (g), is there a difference between testimony and documents?

The COURT. You are getting away from the Heike case. Isn't the statute which was construed in the Heike case worded in the same way?

Mr. MARGOLIUS. No; and here is the answer to it and again I come back to Section 922 (g):

"No person shall be excused from attending and testifying or from producing books, papers——

The COURT. I have read 922 (g).

Mr. MARGOLIUS. If I may repeat these words:

"No person shall be excused from complying with any requirements under this Section" and the requirements make the
40 documents which he now says are immune from 922 (g) the very documents which they are making immune.

The COURT. I understand but how do you get away from the Heike case?

Mr. MARGOLIUS. There isn't any such statute in the Heike case.

The COURT. That is what I want to know.

Mr. DICKEY. If Your Honor please, I think I can give you that. The Heike case arose under the Interstate Commerce Commission and Antitrust Acts. The Antitrust Act did not require the keeping of records. Our point is this Act requires the keeping of these records and it says in this Act, "No person shall be excused from complying with any requirement under this Section." That is the point of distinction between the Heike case and this case.

Further than that, even though it is dicta, there was a question of revealing corporate records on which this individual claim is made.

The COURT. Mr. Margolius, there is another point I want to hear you on. Mr. Walker makes a rather persuasive point, an intriguing point anyway, that if the Act is literally construed it defeats itself because you could never prosecute anyone for violation of the OPA regulations because those violations are almost always apt to be discovered by an examination or have to be discovered by an examination of the business records.

41 Mr. MARGOLIUS. I don't know what prompts Congress to do something, of course.

The COURT. That is a principle of statutory construction that no Act shall be construed so as to arrive at an absurdity.

Mr. MARGOLIUS. There is no absurdity here.

The COURT. Or off utility.

Mr. MARGOLIUS. There is no absurdity in this case. Documents are required to be kept under the regulations by business people, not only to enforce the law but so the Administrator can ascertain what is going on in the particular business without the necessity of criminal enforcement. There are numerous cases which permit perhaps an injunction.

The COURT. But what good is an injunction if it cannot be enforced?

Mr. MARGOLIUS. That I cannot answer.

The COURT. I can answer it is none at all.

Mr. MARGOLIUS. Perhaps it isn't but, as in this case, if the Court please, a mere examination of the subpoena shows that the Office of Price Administration can engage in a complete fishing expedition, look into a man's complete records and subject him to criminal penalties without any immunity on his part. I think this is why Congress put this in this Act, if the Court please. There has never been a statute in the history of this country which

42 gave any one individual so much power as 922 gave to the Administrator of the Office of Price Administration.

As I said when I opened, in the years 1943 and 1944, the Administrator had the power, by regulation, to require every businessman in every type of business subject to regulation to keep records. He had a right to require them to open his doors and his books to inspection. He had a right to require them, by subpoena, to produce them at his will, at his time, at his place, in any quantities that he himself decided would be necessary. You know, as well as anyone does, that many records are kept in error; that some individuals have 15, 20, 25 employees and records are kept by the employees. A businessman could not claim a privilege with so

broad a power in the Administrator to require the production of documents that Congress felt perhaps, and I do not know what the Congress did feel, but for the sake of argument, Congress felt perhaps there should be some immunity to the individual businessman against criminal prosecution. I see nothing wrong with it.

The COURT. No; there is nothing wrong with that. I have a great deal of sympathy with the thought that administrative officials should not be given inquisitorial powers but the argument made by Mr. Walker is that you would defeat all enforcement of the statute because, ordinarily, these violations are discov-
43 ered by an examination of the businessman's books and the minute he submits his books for examination he would be immune.

Mr. MARGOLIUS. My answer to that is that Mr. Walker should get OPA to go to Congress and get Congress to repeal 922 (g) which says, "No person shall be excused from complying with any requirements under this section," but they shall be subject to the immunity provisions in the Compulsory Testimony Act. Let's be clear about this, that the only requirements that 922 (g) can refer to, the only requirements are the keeping of the books.

The COURT. Mr. Margolius, just one more question that I wish to address to counsel. Did your client assert his privilege when he allowed the OPA agents to examine his records?

Mr. MARGOLIUS. This was not an OPA examination. This was a subpoena duces tecum to produce all records in writing and orally.

The COURT. There is no question about that?

Mr. WALKER. No.

The COURT. I have in mind the Monip case because in that case the privilege has to be asserted or it is waived.

Mr. MARGOLIUS. It was done in writing.

The COURT. Do you question that?

Mr. WALKER. No; because this company was very ably
44 represented by Mr. Margolius at the time.

Mr. MARGOLIUS. It is a question of enforcement policy on the part of OPA but I think it is a question for the individual doing business in the community that Section 922 (g) was put in and the primary rule of statutory construction which I think comes before the one Your Honor stated was that you shall not impute to Congress the doing of something that would be written out of the statute if you did not give it meaning. In other words, there are no two ways of interpreting 922 (g). It is impossible to interpret it two ways. What the Office of Price Administration is asking this Court to do is to interpret it in such a way it doesn't fit into 922.

The COURT. I think I get your point.

Mr. MARCOLIUS. I am trying to make it as vigorously as I can, if the Court please, because I feel that way about it for I feel that it would be writing something out of the statute.

The COURT. Vigorousness and force never help to clarify the issue with me.

Mr. WALKER. If Your Honor please, there is one more case I should like to cite which is Bowles against Misle, 64 Fed. Sup. at page 835.

In this case, the Administrator filed a suit for treble damages, I think, and an injunction against Misle, and later
45 the Administrator, under Rule 34, propounded certain interrogatories and asked to see these records which were the required records. The defendant in writing at that time claimed his privilege and the matter came before Judge Delehant. This is just a portion of what he says and he denied the motion. He sustained the motion of the Administrator and denied the motion of the defendant and required the production of those papers. He say this:

"But the broader ground of the public or semi-public character of the records and papers at which the motion is aimed is both the more uniformly asserted and the more surely tenable of the two theories—

and he has reviewed many cases—

"And with it, is and may well be, bracketed the further consideration that the immunities of the Fourth and Fifth Amendments are not absolute but are rather subject to waiver and that he who enters into, or continues in, a business subject to official regulation voluntarily submits his business records and papers to visitorial examination as the law contemplates, and, in that measure waives his constitutional immunities of privacy in respect to his papers and against compulsory testimony."

The COURT. That bears on the Fifth Amendment. Was the statutory point raised in that case?

Mr. WALKER. That I cannot say.

46 The COURT. I am not going to decide this case on the Fifth Amendment.

Mr. WALKER. I cannot say from the records here. I think that the theory of the Judge's remarks in this case, though, are applicable in either event.

The COURT. Is there anything else?

Mr. WALKER. I would like to read just one or two words more of this, Your Honor, simply for the theory.

The COURT. I know that there are authorities which hold that the Fifth Amendment does not apply to records which a person

is required to keep. I have never been able to reconcile myself to those authorities but they are binding on me so, if this was the point involved in this case, I would hold that the Fifth Amendment does not apply but that is not the question.

Mr. WALKER. It is impossible to tell from this case whether the identical point was brought up.

The COURT. But the point is not discussed. We have here a point of novel impression.

Mr. DICKEY. It was not a criminal penalty forfeited.

Mr. MARCOLIUS. It was not production before the Administrator. It was production in open court. There is a great difference.

Mr. WALKER. I do want to reiterate and I am sure Your Honor understands it but I would like to reiterate that these
47 records that we asked for were confined solely and entirely to certain required records under the regulations.

The COURT. They were records that they were required to keep.

Mr. WALKER. That is right and nothing else.

48 The COURT. This is a motion to dismiss a rule to show cause why the respondent should not be punished for contempt of court in that he disobeyed an injunction restraining him from violating certain regulations issued by the Office of Price Administration.

The ground of the motion is that the respondent claims to be entitled to immunity from prosecution because he produced certain documents in response to a subpoena duces tecum issued by the Office of Price Administration and the information which gave rise to the contempt proceeding was obtained from such documents. In effect, the present motion is equivalent to a special plea in bar interposing immunity from prosecution as a complete defense.

The motion is based on provisions of Title II, Section 202 (g) of the Emergency Price Control Act, which is also found in Title 50, U. S. Code, Section 922 (g). That section provides that "No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893, shall apply with respect to any individual who specifically claims such privilege." The Compulsory Testimony Act of 1893, which is found in U. S. Code, Title 49, Section 46, provides, in effect, that no person shall be excused from producing records before the Interstate Com-
49 merce Commission, but no person shall be prosecuted for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said commission.

These two statutes must be taken together, as the Compulsory Testimony Act of 1893 is expressly incorporated by reference in

the Emergency Price Control Act. The two statutes are unambiguous. They exempt from prosecution any person who produces records in response to a subpoena issued by the administrative agency, if the prosecution is to be based on information contained in such records.

It is claimed by the Administrator, however, that the statute should not receive this broad construction. Subsection (b) of the same section of the Emergency Price Control Act authorizes the Administrator to require any person who is engaged in the business of dealing in any commodity to make and keep records and other documents and to furnish information. It is admitted that the records involved in this proceeding are records which the Administrator required to be kept under the regulations issued by him pursuant to this statutory authority. The Administrator claims that the immunity provision should not apply in respect of records which are so required to be maintained, but only as to any other records or information. The Administrator bases his contention on the proposition that the privilege of the Fifth Amend-
50 ment does not apply to records which regulations require to be kept.

The difficulty is, however, that the statute contains no such exception and no such limitation. It may well be that the statutory immunity is broader than the constitutional immunity. As to that, I express no opinion. To read into the statute the qualification which the Administrator would have this Court insert into the Act would practically be to amend an Act of Congress by judicial construction. The act as it stands is unambiguous and unequivocal as well as comprehensive. An insertion of the restriction would, in effect, be an amendment of the Act.

The Court is impressed by the argument of the Administrator that the broad immunity provisions would frequently defeat criminal prosecutions and contempt proceedings brought to enforce the Emergency Price Control Act and the regulations issued thereunder. This is a consideration, however, to be addressed to the Congress rather than to a judicial tribunal, because, as frequently has been said, if a statute is unambiguous, there is no room for construction. If the Congress made the immunity provision so broad as to hamper and perhaps at times frustrate enforcement, Congress alone can provide the remedy.

It is my view that the statute should be construed so as to accord immunity from prosecution on the basis of
51 information obtained from any records produced in response to a subpoena issued by the Administrator, because the statute contains no exception and no limitation and there is no ambiguity or obscurity in the legislative enactment.

For these reasons, I shall grant the motion and dismiss the rule.

REPORTER'S CERTIFICATE

I, Jeanette Rawls, an official reporter for the District Court of the United States for the District of Columbia, hereby certify that the foregoing is the official transcript of the proceedings had in the above-entitled cause.

JEANETTE RAWLS,
Official Reporter.

52 In District Court of the United States for the District of Columbia

IN RE JAMES HOFFMAN

Miscellaneous No. 161

[File endorsement omitted.]

Rule to show cause why respondent should not be punished for contempt of court for violation of injunction granted under the Emergency Price Control Act. On motion to dismiss the rule. Motion granted.

Bernard Margolius, Esq., of Washington, D. C., for the motion; J. Graham Walker, Esq., of Washington, D. C., opposed.

Opinion

Filed Oct. 9, 1946

This is a motion to dismiss a rule to show cause why the respondent should not be punished for contempt of court in that he disobeyed an injunction restraining him from violating certain regulations issued by the Office of Price Administration.

The ground of the motion is that the respondent claims to be entitled to immunity from prosecution because he produced certain documents in response to a subpoena duces tecum issued by the Office of Price Administration and the information which gave rise to the contempt proceeding was obtained from such documents. In effect, the present motion is equivalent to a special plea in bar interposing immunity from prosecution as a complete defense.

The motion is based on provisions of Title II, Section 202 (g) of the Emergency Price Control Act, which is
53 also found in Title 50, United States Code, Section 922 (g). That section provides that "No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893, shall apply with respect to any individual who specifi-

cally claims such privilege." The Compulsory Testimony Act of 1893, which is found in United States Code, Title 49, Section 46, provides, in effect, that no person shall be excused from producing records before the Interstate Commerce Commission, but no person shall be prosecuted for, or on account of, any transaction, matter, or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said commission.

These two statutes must be taken together, as the Compulsory Testimony Act of 1893 is expressly incorporated by reference in the Emergency Price Control Act. The two statutes are unambiguous. They exempt from prosecution any person who produces records in response to a subpoena issued by the administrative agency if the prosecution is to be based on information contained in such records.

It is claimed by the Administrator, however, that the statute should not receive this broad construction. Subsection (b) of the same section of the Emergency Price Control Act authorizes the Administrator to require any person who is engaged in the business of dealing in any commodity to make and keep records and other documents and to furnish information. It is admitted that the records involved in this proceeding are records which
54 the Administrator required to be kept under the regulations issued by him pursuant to this statutory authority. The Administrator claims that the immunity provision should not apply in respect of records which are so required to be maintained, but only as to any other records or information. The Administrator bases his contention on the proposition that the privilege of the Fifth Amendment does not apply to records which regulations require to be kept.

The difficulty is, however, that the statute contains no such exception and no such limitation. It may well be that the statutory immunity is broader than the constitutional immunity. As to that, I express no opinion. To read into the statute the qualification which the Administrator would have this Court insert into the Act would practically be to amend an Act of Congress by judicial construction. The Act as it stands is unambiguous and unequivocal as well as comprehensive. An insertion of the restriction would, in effect, be an amendment of the Act.

The Court is impressed by the argument of the Administrator that the broad immunity provisions would frequently defeat criminal prosecutions and contempt proceedings brought to enforce the Emergency Price Control Act and the regulations issued thereunder. This is a consideration, however, to be addressed to the Congress, rather than to a judicial tribunal, because, as frequently has been said, if a statute is unambiguous, there is no room for construction. If the Congress made the immunity pro-

vision so broad as to hamper and perhaps at times frustrate enforcement, Congress alone can provide the remedy.

55 It is my view that the statute should be construed so as to accord immunity from prosecution on the basis of information obtained from any records produced in response to a subpoena issued by the Administrator, because the statute contains no exception and no limitation and there is no ambiguity or obscurity in the legislative enactment.

For these reasons, I shall grant the motion and dismiss the rule.

ALEXANDER HOLTZOFF,
Associate Justice.

OCTOBER 4, 1946.

56 In the District Court of the United States for the District of Columbia

Misc. No. 161

IN RE JAMES HOFFMAN

[File endorsement omitted.]

Order dismissing rule to show cause, etc.

Filed Oct. 8, 1946

This matter coming on for hearing on the Motion to Dismiss the Rule to Show Cause and the Petition, and after full argument by counsel, it is by the Court this 8 day of October 1946

Ordered and adjudged, that the Motion to Dismiss be, and the same is hereby granted.

ALEXANDER HOLTZOFF, *Justice.*

Approved as to form.

ROBERT B. KENNEDY,
Asst. Enforcement Atty.

57 In the District Court of the United States for the District of Columbia

[Title omitted.]
[File endorsement omitted.]

Notice of appeal

Filed Oct. 29, 1946

Name and address of appellant: United States of America.

Name and address of appellant's attorney: Edward M. Curran, United States Attorney for the District of Columbia and J.

Grahame Walker, District Enforcement Attorney, Office of Price Administration, 5601 Connecticut Avenue, NW., Washington, D. C.

Offense: Criminal contempt.

Concise statement of judgment or order, giving date, and any sentence: Order entered October 8, 1946, dismissing rule to show cause.

Name of institution where now confined, if not on bail: None.

The above-named appellant hereby appeals to the United States Court of Appeals for the District of Columbia from the above-stated judgment.

Dated, October 29, 1946.

EDWARD M. CURRAN,
J. GRAHAME WALKER,
Attorneys for Appellant.

58 In the District Court of the United States for the District of Columbia

[Title omitted.]

[File endorsement omitted.]

Designation of record

Filed Nov. 8, 1946

The clerk of the Court will please include in the transcript of record on appeal in the above-entitled cause to the United States Court of Appeals for the District of Columbia, the following portions of the record and proceedings:

1. Petition for the institution of criminal contempt proceedings.
2. Exhibit "A" to petition.
3. Rule to show cause.
4. Order appointing Honorable Edward M. Curran, United States Attorney for the District of Columbia, and J. Grahame Walker, District Enforcement Attorney, to prosecute contempt proceedings.
5. Motion to dismiss rule to show cause.
6. Affidavit in support of motion to dismiss.
7. Motion to suppress evidence.
8. Order dated October 8, 1946, dismissing rule to show cause and petition.
9. Transcript of proceedings.
10. Notice of appeal.
11. This designation.

J. Grahame Walker,
J. GRAHAME WALKER,
Attorney for Government.

Above designation served by mailing a copy thereof to Messrs. Buckley and Danzansky, 315 National Press Building, Washington, D. C., this 8th day of November 1946.

J. GRAHAME WALKER,
Attorney for Government.

59 [Clerk's certificate to foregoing transcript omitted in printing.]

61 In the United States Court of Appeals for the District of Columbia

Civil Action No. 9435

UNITED STATES OF AMERICA, APPELLANT

v.

JAMES HOFFMAN, APPELLEE

[File endorsement omitted.]

Motion to certify the cause to the Supreme Court of the United States pursuant to the Criminal Appeals Act, as amended

Filed March 31, 1947

The United States, by George T. Washington, Acting Solicitor General, and J. Grahame Walker, Attorney, Office of Temporary Controls, Office of Price Administration, moves this Court to certify the above-entitled case to the Supreme Court of the United States, pursuant to the Criminal Appeals Act, as amended by the Act of May 9, 1942, c. 295, 56 Stat. 271 (18 U. S. C., Supp. V, 682), on the ground that the appeal herein from a judgment sustaining a special plea in bar in a criminal case should have been taken directly to the Supreme Court.

The jurisdiction of this Court was originally invoked under the Act of March 3, 1901, 31 Stat. 1341 (D. C. Code of 1940, Title 23, § 105). We have reached the conclusion that the Criminal Appeals Act, as amended by the Act of May 9, 1942, superseded pro tanto the Act of May 3, 1901, and hence that the appeal herein should have been taken under the Criminal Appeals Act.

We recognize that the Supreme Court held in United States v. Burroughs, 289 U. S. 159, that the original Criminal Appeals
62 Act did not apply to the District of Columbia, and that in this district appeals by the United States in criminal cases were controlled by the Act of March 3, 1901, supra. However, we

think that the 1942 amendment of the Criminal Appeals Act, supra, which broadened the right of the United States to appeal by providing for appeals to the circuit courts of appeal in two classes of cases, extended the Act to the District of Columbia, insofar as appeals from the district court to this Court are concerned, by providing:

"An appeal may be taken by and on behalf of the United States from the district courts to a circuit court of appeals or the United States Court of Appeals for the District of Columbia, as the case may be, in all criminal cases, in the following instances, to wit:

"From a decision or judgment quashing, setting aside, or sustaining a demurrer or plea in abatement to any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.

"From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section."

Similarly, in providing for cases where the appeal is taken to the wrong court, the Act again names this Court and provides that if an appeal is taken to this Court which should have been taken to the Supreme Court, this Court should certify the case to the Supreme Court, and in the converse situation, the Supreme Court should remand the cause to this Court. And finally, in amending Section 225 of the Judicial Code (28 U. S. C. 225), which confers appellate jurisdiction on the courts of appeal, Section 2 of the 1942 amendment added a new paragraph (f) conferring jurisdiction on the circuit courts of appeal and on this Court "to review decisions and judgments of the district courts in criminal cases on appeals taken by the United States in cases where such appeals are permitted by law." Since this Court has long possessed jurisdiction to decide appeals by the United States in criminal
63 cases pursuant to the Act of March 3, 1901, supra, p. 2, the clear purpose of Section 2 of the 1942 amendment was to confer jurisdiction on this Court, as well as the circuit courts of appeal, to decide appeals taken pursuant to the Criminal Appeals Act. Thus, the plain language of the act [1] compels the conclusion that it is intended to have application in the District of Columbia. Cf. United States v. Belt, 319 U. S. 521, in which the Supreme Court held that Section 5 of the Act of April 27, 1912, 37 Stat. 93, allowing appeals to that court from final decrees of the Supreme Court of the District of Columbia, was repealed by Section 238 of

[1] The legislative history sheds no light on this aspect of the amendment. Instead, it seems to have been assumed that this Court was not distinguishable from the various circuit courts of appeal insofar as appeals by the United States in criminal cases are concerned. The Committee Reports are as follows: H. Rep. No. 45 and Sen. Rep. No. 868, 77th Cong., 1st Sess.; H. Rep. No. 2052, 77th Cong., 2d sess.

the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, 938.

If we are correct in our position that the Criminal Appeals Act repealed pro tanto the Act of March 3, 1901, then this appeal was improvidently taken to this Court and should be certified to the Supreme Court of the United States pursuant to the provisions of the Criminal Appeals Act. This is a criminal contempt proceeding and hence a criminal case within the meaning of the Criminal Appeals Act. See United States v. Goldman, 277 U. S. 229. The judgment appealed from is one sustaining a special plea in bar based on a claim of immunity from prosecution derived from the production of records pursuant to subpoena. Under the Criminal Appeals Act, only the Supreme Court has jurisdiction of an appeal from such a judgment.

George T. Washington,
GEORGE T. WASHINGTON,
Acting Solicitor General.
J. Grahame Walker,
J. GRAHAME WALKER,
Attorney, Office of Temporary Controls,
Office of Price Administration,
100 East Lombard Street, Baltimore, Maryland.

64 In the United States Court of Appeals for the District of Columbia

[Title omitted.]
[File endorsement omitted.]

Answer to motion to certify cause to the Supreme Court of the United States

Filed April 2, 1947

Comes now the Appellee, James Hoffman, by his attorneys and for his answer to the Motion to Certify the Cause to the Supreme Court of the United States Pursuant to the Criminal Appeals Act, states as follows:

The position taken by the Appellant was first advanced by the Appellee in his brief at page 6. However, Appellee further argues that the Appellant is without standing to prosecute the appeal. If Appellee's position with respect to that contention is sustained, then the appeal should be dismissed without further consideration. It is necessary, therefore, before this court enters an order certifying this case to the Supreme Court to determine whether the appeal itself should be permitted. In the event there is no proper party Appellant, there would be no case to certify to the higher court.

As Appellant has been advised, this appeal has been set for argument for Monday, April 7, 1947. It is Appellee's position that the argument should be heard with respect to the Appellant's standing to bring the appeal and that matter determined before action is taken on the motion filed by Appellant.

Respectfully submitted.

Joseph B. Danzansky,
JOSEPH B. DANZANSKY,
Bernard Margolius,
BERNARD MARGOLIUS,
Attorneys for Appellee.

65 CERTIFICATE OF SERVICE

I hereby certify that a copy of the above-entitled answer was served upon the Appellant by mailing a copy to George T. Washington, Acting Solicitor General, Department of Justice, Washington, D. C., this 2d day of April 1947.

Bernard Margolius,
BERNARD MARGOLIUS.

66 In the United States Court of Appeals for the District of Columbia

[Title omitted.]
[File endorsement omitted.]

Memorandum of points and authorities

Filed April 8, 1947

1. With respect to the application to the present case of the Criminal Appeals Act of 1907, 18 U. S. C., § 682, as amended May 9, 1942, Appellee takes the position that this depends upon the proper construction to be placed upon Title 28 U. S. C. § 389, governing criminal contempts of the nature herein involved. The latter Section 389 provides for punishment "in conformity to the usages at law and in equity prevailing on October 15, 1914". The Criminal Appeals Act was not applicable to the District of Columbia prior to 1942 when it was expressly amended, and therefore, was not effective in this jurisdiction on October 15, 1914. That Act admittedly was applicable to criminal contempts in jurisdictions other than the District of Columbia because it applied generally to District Courts. In United States vs. Burroughs, 289 U. S. 159, 53 S. Ct. 574, 77 L. Ed. 1096, decided prior to the 1942 amendment, it was expressly held that the Act of 1907 did not apply in the District of Columbia.

Since there has been no amendment to the Criminal Contempt Statute and since that Statute incorporates as part of the procedure the usages in law as of October 15, 1914, it is questionable whether a 1942 amendment to an entirely different Statute, namely the Criminal Appeals Act, which latter Act does not specifically refer to criminal contempt cases, can be held to govern an appeal in the District of Columbia from a judgment in a criminal contempt case.

67 2. It is also questionable whether Section 105 of Title 23 of the District of Columbia Code of 1940 applies to the present case because that Section is specifically limited to appeals in criminal prosecutions which are prosecuted by the United States. In addition to the contention advanced by Appellee in the oral argument, reference is made to the case of Meyers vs. United States, 264 U. S. 95, 24 S. Ct. 826, 49 L. Ed. 99, in which it was held that contempt proceedings are not "criminal prosecutions" within the common understanding of that term. It follows that under the practice and procedure existing in October 1914, the right to appeal in the present case is not too clear.

3. With respect to the authority of the attorneys for the Office of Price Administration to bring this appeal, Appellee relies upon the general rule that an attorney cannot, on his own motion, appeal from a judgment injuriously affecting the interest of his client without that client's consent. The authority of attorneys to represent parties in an original suit is at an end when the first judgment is rendered, Brown vs. Grand Trunk Western Railway Co., 124 F. 2d 1016 (6th Cir.). In the present case counsel was appointed by the District Court and it is submitted that their power to act terminated when the judgment was rendered by the District Court dismissing the petition. It is difficult to follow the argument that counsel can appeal from an order entered by the very judge who appointed them and still maintain that they are authorized to proceed. If the attorneys appointed by the court had been private attorneys and not, by force of circumstances, government attorneys, Appellee's point would appear more clearly. A court-appointed attorney, acting on behalf of the court itself, would be appealing from a judgment which he believed the court appointing him was in error in rendering. The proper rule is that the power of attorney ceases when the judgment in the case is rendered.

4. Furthermore, there is nothing in the record to indicate the authority of attorneys for the Office of Price Administration appear for the United States. Criminal as well as civil actions on behalf of the United States are under the control and direc-

68 tion of the Attorney General (See United States vs. San Jacinto Tin Co., 125 U. S. 274; Sutherland vs. International Insurance Company of New York, 43 F. 2d 969):

The absence of a warrant of attorney authorizing the filing of the appeal in the present case by the Attorney General, it is submitted, is sufficient to dismiss the appeal.

Respectfully submitted.

BUCKLEY & DANZANSKY.
By Joseph B. Danzansky.
JOSEPH B. DANZANSKY.
Bernard Margolius.
BERNARD MARGOLIUS.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above-entitled Memorandum of Points and Authorities was served upon the Appellant by mailing a copy to J. Grahame Walker, attorney for Appellant, Office of Temporary Controls, Office of Price Administration, McCaley Building, 400 E. Lombard Street, Baltimore 2, Maryland, this 8 day of April 1947.

Bernard Margolius.
BERNARD MARGOLIUS.

69 In United States Court of Appeals, District of Columbia

No. 9435

UNITED STATES OF AMERICA, APPELLANT

vs.

JAMES HOFFMAN, APPELLEE

Appeal from the District Court of the United States for the District of Columbia

Argued April 7, 1947—Decided May 5, 1947

[File endorsement omitted.]

Mr. Irving S. Shapiro, Attorney, Department of Justice, and Mr. Abraham H. Maller, Special Appellate Attorney, Office of Price Administration branch, Office of Temporary Controls, with whom Mr. J. Grahame Walker, Attorney, Office of Price Administration branch, Office of Temporary Controls, was on the brief, for appellant.

Mr. Bernard Margolius, with whom Messrs. Joseph B. Danzansky and Raymond R. Dickey were on the brief, for appellee.

Before GRONER, C. J., and EDGERTON and PRETTYMAN, J.J.

Opinion

Filed May 5, 1947

PER CURIAM: In a civil action brought in the District Court by the Price Administrator, a consent decree was entered enjoining the appellee from selling automobiles at prices in excess of established ceilings. Later the Price Administrator sought to institute criminal contempt proceedings, alleging violation of the injunction. A rule to show cause was issued. Hoffman filed a motion to dismiss the rule. The District Court granted the motion. Thereupon the United States appealed.

The motion to dismiss, which was supported by an affidavit, was upon the ground that the rule had issued because of transactions revealed by books, contracts and other documents produced by Hoffman under a subpoena duces tecum issued by the Office of Price Administration, after Hoffman had specifically claimed immunity under the Fifth Amendment and the Compulsory Testimony Act.[1]

70 Under the Criminal Appeals Act,[2] an appeal in a criminal case may be taken by and on behalf of the United States

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[1] Act of Feb. 11, 1893, 27 Stat. 443, 49 U. S. C. A. § 46; incorporated by reference in the Emergency Price Control Act of 1942, 56 Stat. 30, 50 U. S. C. A. App. § 922 (g).

[2] "An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances, to wit:

"From a decision or judgment quashing, setting aside, or sustaining a demurrer or plea in abatement to any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.

"An appeal may be taken by and on behalf of the United States from the district courts to a circuit court of appeals or the United States Court of Appeals for the District of Columbia, as the case may be, in all criminal cases, in the following instances, to wit:

"From a decision or judgment quashing, setting aside, or sustaining a demurrer or plea in abatement to any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this Act.

"From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this Act.

"The appeal in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted.

"Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be admitted to bail on his own recognizance: *Provided*, That if an appeal shall be taken pursuant to this Act to the Supreme Court of the United States which, in the opinion of that Court, should have been taken to a circuit court of appeals, or the United States Court of Appeals for the District of Columbia, the Supreme Court of the United States shall remand the cause to the circuit court of appeals or the United States Court of Appeals for the District of Columbia, as the case may be, which shall then have jurisdiction to hear and determine the same as if the appeal had been taken to that court in the first instance; and if an appeal shall be taken pursuant to this section to any circuit court of appeals or to the United States Court of Appeals for the District of Columbia, which, in the opinion of such court, should have been taken directly to the Supreme Court of the United States, such court shall certify the case to the Supreme Court of the United States, which shall thereupon have jurisdiction to hear and determine the cause to the same extent as if an appeal had been taken directly to that Court.

"Rules of practice and procedure with respect to appeals authorized by this Act shall be prescribed by the Supreme Court of the United States in accordance with the provisions of the Act of June 29, 1940 (54 Stat. 688, U. S. C., title 18, sec. 687)." Act of May 9, 1942, 56 Stat. 271, 18 U. S. C. A. § 682.

direct to the Supreme Court from a judgment sustaining a special plea in bar. A criminal contempt proceeding is a criminal case. The motion to dismiss because of the proceeding was barred by the Compulsory Testimony Act was clearly a special plea in bar. Therefore, a judgment sustaining that motion is reviewable, under the Criminal Appeals Act, upon direct appeal to the Supreme Court.[4] The statute further provides that appeals may not be taken to this court where such an appeal to that Court is provided, and that this court shall certify to that Court a case which should have been taken there directly.

It was held in United States v. Burroughs[5] that the then Criminal Appeals Act did not apply to the District of Columbia.
71 But the Act was amended in 1942, and under its present provisions appeals to this court, by name, are specifically provided. Moreover, Section 128 of the Judicial Code, as amended,[6] gives this court power to review judgments of the District Court in criminal cases on appeals taken by the United States "in cases where such appeals are permitted by law." This latter clause was part of the act amending the Criminal Appeals Act in 1942, and clearly brings this court within the terms of that amended Act.

It follows that pursuant to the Criminal Appeals Act this court, being of the opinion that this appeal should have been taken directly to the Supreme Court of the United States, must certify the case to that Court.

Appellee contends that the appeal was not properly taken by the United States, because the United States was not a party to the proceeding below, and that this court should, therefore, dismiss the appeal. But we think that the Criminal Appeals statute contemplates that the entire appellate proceeding should be in the Supreme Court and that, therefore, that Court must determine all questions involved. We do not think that the Act contemplated a division of the appellate proceeding so that this court, or another Circuit Court of Appeals, would determine the propriety of the procedural aspects of the appeal, including the rights of parties to appeal, and the Supreme Court would then determine only the merits of the substantive questions.

Case certified to the Supreme Court of the United States.

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[3] United States v. Goldman, 277 U. S. 229, 72 L. Ed. 862, 48 S. Ct. 486 (1928); Pendergast v. United States, 317 U. S. 412, 417, 87 L. Ed. 368, 63 S. Ct. 268 (1943); Gompers v. United States, 233 U. S. 604, 58 L. Ed. 1115, 34 S. Ct. 693 (1914).

[4] United States v. Goldman, *supra* note 3.

[5] 289 U. S. 159, 77 L. Ed. 1096, 53 S. Ct. 574 (1933).

[6] 56 Stat. 272, 28 U. S. C. A. § 225 (f) (1942).

72 In United States Court of Appeals for the District of Columbia

No. 9435—April Term, 1947

UNITED STATES OF AMERICA, APPELLANT

vs.

JAMES HOFFMAN, APPELLEE

[File endorsement omitted.]

Appeal from the District Court of the United States for the District of Columbia.

Before: GRONER, C. J., and EDGERTON and PRETTYMAN, JJ.

Order certifying cause to the Supreme Court of the United States

Filed May 5, 1947

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel.

On consideration whereof, it is now here ordered that this case be, and the same is hereby, certified to the Supreme Court of the United States pursuant to the provisions of the Act of May 9, 1942, Ch. 295. 56 Stat. 271, 18 U. S. C. Sec. 682.

And it is further ordered by the Court that the Clerk be, and he is hereby, authorized and directed to certify and transmit to the Supreme Court a transcript of the record and proceedings in this Court in said cause.

PER CURIAM.

Dated May 5, 1947.

73 [Clerk's certificate to foregoing transcript omitted in printing.]

75 In the Supreme Court of the United States

Statement of points to be relied on and designation of record

Filed June 12, 1947

Pursuant to Rule 13, Paragraph 9, of this Court, appellant states that it intends to rely on the following points:

1. The district court erred in holding that appellee was entitled to immunity under the provisions of Section 202 (g) of the Emer-

gency Price Control Act and the Compulsory Testimony Act because he produced, pursuant to subpoena, records required by law to be kept.

2. The district court erred in granting appellee's motion to dismiss the rule to show cause.

Appellant deems the entire record, as filed in the above-entitled case, necessary for the consideration of the points relied upon.

George T. Washington,
GEORGE T. WASHINGTON,
Acting Solicitor General.

[Endorsement on cover:] Certified to this Court by U. S. Court of Appeals for the District of Columbia. File No. 52265. District of Columbia, D. C. U. S. Term No. 1401. The United States of America, Appellant vs. James Hoffman. Filed May 22, 1947. Term No. 1401 O. T. 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1947

FILE COPY

No. 97

In the Supreme Court of the United States

OCTOBER TERM, 1947

UNITED STATES OF AMERICA, APPELLANT

v.

JAMES HOFFMAN

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 97

UNITED STATES OF AMERICA, APPELLANT

v.

JAMES HOFFMAN

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court (R. 28–30) is reported at 68 F. Supp. 53. The opinion of the United States Court of Appeals for the District of Columbia (R. 38–39), certifying the case to this Court pursuant to the Criminal Appeals Act, is reported at 161 F. 2d 881.

JURISDICTION

The order of the district court dismissing the rule to show cause was entered October 8, 1946 (R. 30). Notice of appeal to the United States Court of Appeals for the District of Columbia was filed October 29, 1946 (R. 31). On March 31, 1947, the Government moved to certify the case to

the Supreme Court pursuant to the Criminal Appeals Act (R. 32–34), and on May 5, 1947, the Court of Appeals entered an order certifying the case to this Court (R. 40). On June 2, 1947, this case was set down for argument to follow *Shapiro* v. *United States*, No. 49, this Term.

The jurisdiction of this Court to review the district court's order on direct appeal is conferred by the Act of March 2, 1907, c. 2564, 34 Stat. 1246, as amended by the Act of May 9, 1942, c. 295, 56 Stat. 271, 18 U. S. C., Supp. V, 682, commonly known as the Criminal Appeals Act, and by Section 238 of the Judicial Code, as amended, 28 U. S. C. 345.

QUESTION PRESENTED

Whether appellee who, in compliance with an administrative subpoena, produced business records required to be kept by a regulation promulgated by the Price Administrator, thereby obtained immunity from the present prosecution.

CONSTITUTIONAL PROVISION, STATUTES AND REGULATION INVOLVED

The pertinent provisions of the Constitution, the Emergency Price Control Act of 1942, and the Compulsory Testimony Act of 1893 are set forth in the appendix to the Brief for the United States, pp. 43–46, in *Shapiro* v. *United States*, No. 49, which precedes this case on oral argument.

In addition, the Act of June 30, 1906, 34 Stat. 798, c. 3920 (49 U. S. C. 48), provides as follows:

Under the immunity provisions in the Act entitled "An Act in relation to testimony before the Interstate Commerce Commission," and so forth, approved February eleventh, eighteen hundred and ninety-three, in section six of the Act entitled "An Act to establish the Department of Commerce and Labor," approved February fourteenth, nineteen hundred and three, and in the Act entitled "An Act to further regulate commerce with foreign nations and among the States," approved February nineteenth, nineteen hundred and three, and in the Act entitled "An Act making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June thirtieth, nineteen hundred and four, and for other purposes," approved February twenty-fifth, nineteen hundred and three, immunity shall extend only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath.

Section 12 of Maximum Price Regulation 540, promulgated June 10, 1944, effective July 10, 1944, 9 Fed. Reg. 6434, as amended September 12, 1944, 9 Fed. Reg. 10873, and May 9, 1945, 10 Fed. Reg. 5037, provided as follows:

§ 12. *Records and reports.*

(a) *Records.*—Every person generally engaged in the business of selling used cars shall, so long as this regulation remains in effect, keep and make available for examination by the Office of Price Administra-

tion the following information in regard to every used car he has acquired for resale:

(1) A complete description of the used car including make, model, year, serial number, motor number, body type and passenger capacity;

(2) The name and address of the person from whom he acquired the used car;

(3) The price he paid for the used car either on an outright purchase or on a trade-in;

(4) The cost of repairs and replacements made in the used car and a description of the repairs and replacements made;

(5) The name and address of the person to whom he sold the used car;

(6) The price he charged the purchaser for the used car excluding taxes and finance charges;

(7) The amount he charged the purchaser to cover taxes and the taxes for which the amount was charged;

(8) The amount he charged the purchaser for financing the sale on an installment basis, if any;

(9) A copy of the warranty he furnished the purchaser if he sold the used car at a price higher than the base price in Appendix B plus permissible equipment allowances in Appendix D.

(b) *Inventory report of used cars as of September 1[7], 1944.*—Every dealer, or other seller generally engaged in the business of selling used cars, shall file with his

local War Price and Rationing Board not later than September 21, 1944, a report on the form in Appendix G, of all used cars in his stock as of September 11, 1944, inclusive.

(c) *Additional records and reports.*— Every dealer, or other seller generally engaged in the business of selling used cars, shall keep such records and file such reports in addition to those required by paragraphs (a) and (b) as the Office of Price Administration may from time to time require. Such additional records and reports, however, shall be subject to the approval of the Bureau of the Budget in accordance with the Federal Reports Act of 1942.

STATEMENT

On May 11, 1945, a consent decree for final injunction was entered in the United States District Court for the District of Columbia restraining appellee and his employees from selling, delivering or offering to sell or deliver used passenger automobiles at prices in excess of the maximum prices established therefor by Maximum Price Regulation 540 or any other pertinent price regulation (R. 6–7). Thereafter, on February 27, 1946, the Price Administrator filed in the same court a petition for the institution of criminal contempt proceedings against appellee, alleging numerous sales in violation of the injunction (R. 1–6). A rule to show cause issued

(R. 7), and at the same time, the court entered an order appointing the United States Attorney and the Office of Price Administration's District Enforcement Attorney "to prosecute the criminal charges contained in the petition filed herein on behalf of the Court and of the United States" (R. 8).

On September 23, 1946, appellee filed a motion to dismiss the rule to show cause on the ground that he was immune from prosecution for the transactions upon which the Price Administrator's petition was founded (R. 8).[1] In a supporting affidavit (R. 9–10), appellee stated that on January 11, 1946, he was served with a *subpoena duces tecum*, issued by the Office of Price Administration, requiring him to testify concerning sales of used passenger automobiles and to bring with him "'any and all records required by the provisions of Section 12 of the Maximum Price Regulation 540 with respect to any and all automobiles purchased, or otherwise acquired, sold, delivered, or otherwise disposed of, from October 1, 1945 to the date of the service of this subpoena'" (R. 9). Appellee further stated that he appeared with counsel at the time and place designated and claimed "all of the immunities from self-incriminating testimony as given by the Fifth Amendment of the Constitution of the United

[1] He later also filed a motion to suppress as evidence the books and records which he was compelled to produce (R. 10).

States and given by the Act, commonly known as the Compulsory Testimony Act (49 U. S. C. A. § 46)"; that notwithstanding this claim, the presiding officer at the hearing received the records produced in response to the subpoena; and that the rule to show cause was based on transactions revealed by the records which appellee compulsorily produced (R. 9–10).

The motion came on for hearing before Mr. Justice Holtzoff on October 4, 1946 (R. 11–27). The court thereafter entered its opinion and order (R. 28–30) dismissing the rule to show cause (R. 30). The court held that Section 202 (g) of the Emergency Price Control Act and the Compulsory Testimony Act of 1893 extend immunity to "any person who produces records in response to a subpoena issued by the administrative agency if the prosecution is to be based on information contained in such records," apparently without regard to whether the records are protected by the privilege against self-incrimination (R. 29–30).

SPECIFICATION OF ERRORS TO BE URGED[1]

The district court erred:

1. In holding that Section 202 (g) of the Emer-

[1] Appellee contended in the Court of Appeals that the United States was not a party to the proceedings in the district court and therefore that it has no right of appeal. The Court of Appeals did not pass on the contention; instead, the court suggested that since the case was being certified to this Court, the question was one for decision by this Court. (continued on next page.)

gency Price Control Act and the Compulsory Testimony Act extend immunity to one who produced records which are required by law to be kept and are thus outside the protection of the privilege against self-incrimination.

2. In granting the motion to dismiss the rule to show cause.

ARGUMENT

APPELLEE HAD NO PRIVILEGE TO REFUSE PRODUCTION OF THE RECORDS INVOLVED, AND HE THEREFORE OBTAINED NO IMMUNITY UNDER SECTION 202 (g) OF THE EMERGENCY PRICE CONTROL ACT.

The principal question here involved is also presented in *Shapiro* v. *United States*, No. 49, this Term, which precedes this case on oral argument.

In our view, the record plainly demonstrates that the proceedings in the district court involved a charge of criminal contempt, which by definition includes the United States as a party to the proceeding. *United States* v. *Goldman*, 277 U. S. 229, 235; *Ex parte Grossman*, 267 U. S. 87, 115; *Michaelson* v. *United States*, 266 U. S. 42, 67; see also, *United States* v. *Mine Workers*, 330 U. S. 258. Consistently with the procedure set forth in Rule 42 (b) of the Federal Rules of Criminal Procedure, the proceedings in the district court were instituted by a "Petition for the Institution of Criminal Contempt Proceedings" (R. 1–6), signed by the O. P. A. District Enforcement Attorney on behalf of the Price Administrator. The petition set forth facts which constituted a violation of the court's earlier injunction and prayed (R. 6), *inter alia*, that the court "appoint attorneys to prosecute the charge of criminal contempt on behalf of the United States and this Honorable Court"; that "the Court fix a date for a hearing on the charge of criminal contempt"; and that

Appellee gave no oral testimony at the administrative hearing, and he was not required to produce any books or records other than those which he was required to keep by Section 12 of Maximum Price Regulation 540. He did produce, in response to the subpoena, records showing his purchases and sales of used passenger automobiles during the period from October 1, 1945, to January 11, 1946.

As we point out in our brief in the *Shapiro* case (pp. 11–21), settled judicial decisions dating back to *Boyd* v. *United States*, 116 U. S. 616, and *Wilson* v. *United States*, 221 U. S. 361, establish that records which are properly required to be kept by law are not private records and are not protected by the privilege against self-incrimination. The records which appellee was required to produce were of that character. Having undertaken to buy and sell used cars pursuant to the

"the Court impose a sentence of fine or imprisonment or both upon the respondent, James Hoffman, in the event that the court shall find him guilty." On the basis of the petition the district court issued a rule to show cause why appellee should not be adjudged guilty of criminal contempt (R. 7), and at the same time the court appointed United States Attorney Curran and O. P. A. District Enforcement Attorney Walker "as attorneys to prosecute the criminal charges contained in the petition filed herein on behalf of the Court and of the United States" (R. 8). Thereafter, Walker appeared in court to oppose appellee's motion to dismiss the rule to show cause (R. 11), and when the motion was granted, a notice of appeal on behalf of the United States was filed by both court-appointed attorneys (R. 30–31). In the Court of Appeals, the Acting Solicitor General directly entered the case by filing a motion to certify the cause to this Court pursuant

terms of the Emergency Price Control Act and the applicable regulation issued by the Price Administrator, it was appellee's duty to maintain records showing his transactions in the regulated commodity. He performed that duty and in compliance with his responsibility under the Act, he disclosed the records to a representative of the Price Administrator upon proper demand.

In doing so, appellee claimed immunity pursuant to Section 202 (g) of the Emergency Price Control Act, and the district court—erroneously, we believe—sustained his claim. The district court did not concern itself with the question whether the records which appellee disclosed were constitutionally privileged from compulsory disclosure. Instead, the court held, as a matter of

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to the Criminal Appeals Act (R. 32–34), and his representative participated in the argument of the motion in that court (see R. 37).

Quite plainly, the petition in the district court contemplated a criminal contempt proceeding and gave appellee notice of this fact. The district judge so regarded it, and appointed prosecuting attorneys, one of whom was the United States Attorney. The fact that Walker, who is not on the United States Attorney's staff, was also appointed does not detract from the criminal nature of the prosecution. The procedure has been sanctioned repeatedly. *United States* v. *Lederer*, 140 F. 2d 136, 138 (C. C. A. 7), certiorari denied, 322 U. S. 734; *McCann* v. *New York Stock Exchange*, 80 F. 2d 211, 214 (C. C. A. 2); *Phillips S. & T. P. Co.* v. *Amalgamated Ass'n. of I., S. & T. W.*, 208 Fed. 335, 344 (S. D. Ohio). See also, Rule 42 (b), F. R. Crim. P. Nothing which occurred in the courts below furnishes any basis for doubting the fact that the United States was an essential party to the proceeding.

statutory construction, that in Section 202 (g) and the Compulsory Testimony Act, Congress used broad language in granting immunity and did not except cases like this one where there is no constitutional privilege and, hence, no necessity for a grant of immunity. In our view, the decision overlooks the plain Congressional policy to exchange immunity only for evidence which is privileged and otherwise could not be had; the policy of Section 202 (g) which is to facilitate enforcement of the Act, and the language of the section which adopts the immunity provisions of the Compulsory Testimony Act only where the witness has a privilege and specifically claims it; and the guides which this Court laid down in *Heike* v. *United States*, 227 U. S. 131, 142, in rejecting the contention that the immunity statute should be construed to extend to the compelled disclosure of information which is not privileged. We have set forth these views at length in our brief in the *Shapiro* case, pp. 21–39, and the Court is respectfully referred to the arguments there advanced.

A further consideration, not involved in the *Shapiro* case, may be mentioned. It does not appear from the record in this case that the appellee was sworn and produced the records under oath, a condition precedent to the flow of immunity. Act of June 30, 1906, 34 Stat. 798, 49 U. S. C. 48 (*supra*, pp. 2–3). The history and purposes of the 1906 Act are reviewed at length in the Government's brief in opposition in *Peters* v. *United*

States, No. 256, this Term, pending on petition for certiorari. Since it was appellee's burden in the district court to establish that he was entitled to immunity, *United States* v. *Heike,* 175 Fed. 852 (S. D. N. Y.), appeal dismissed, 217 U. S. 423, this constitutes an additional ground on which the district court should have denied appellee's motion to dismiss.

CONCLUSION

We respectfully submit that the order of the district court should be reversed and the cause remanded to that court with instructions to proceed to a trial of the criminal contempt charge against appellee.

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No. 97

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

UNITED STATES OF AMERICA,
Appellant,

vs.

JAMES HOFFMAN,
Appellee.

On Appeal from the District Court of the United States for the District of Columbia

BRIEF FOR THE APPELLEE

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BRIEF FOR THE APPELLEE

OPINIONS BELOW

The opinion of the District Court (R. 28-30) is reported at 68 F. Supp. 53. The opinion of the United States Court of Appeals for the District of Columbia (R. 38-39), certifying the case to this Court pursuant to the Criminal Appeals Act, is reported at 161 F. 2nd. 881.

JURISDICTION

The order of the District Court dismissing the rule to show cause was entered October 8, 1946 (R. 30). Notice of appeal to the United States Court of Appeals for the District of Columbia was filed October 29, 1946 (R. 31). On March 31, 1947, the government moved to certify the case to the Supreme Court pursuant to the Criminal Appeals Act (R. 32-34), and on May 5, 1947, the Court of Appeals entered an order certifying the case to this Court (R. 40). On June 2, 1947, this case was set down for argument to follow *Shapiro vs. United States*, No. 49, this Term.

The jurisdiction of this Court to review the District Court's order on direct appeal is conferred by the Act of March 2, 1907, c. 2564, 34 Stat. 1246, as amended by the Act of May 9, 1942, c. 295, 56 Stat. 271, 18 U. S. C., Supp. V, 682, commonly known as the Criminal Appeals Act, and by Section 238 of the Judicial Code, as amended, 28 U. S. C. 345.

QUESTIONS PRESENTED

1. Whether Appellee who, in compliance with an administrative subpoena, produced business records required to be kept by a regulation promulgated by the Price Administrator, thereby obtained immunity from the present prosecution.

2. Whether the appeal in this case was properly taken by and on behalf of the United States.

ARGUMENT

I

Appellee Had a Privilege against Self-Incrimination with Respect to Records of His Business and Obtained Immunity under Section 202 (g) of the Emergency Price Control Act

The question here to be decided is one which Appellee believes has never been directly presented to this Court for determination. Upon analysis, the question resolves itself into two parts. First, whether the privilege against self-incrimination under the Fifth Amendment extends to and includes the compulsory production of an individual's business records of the kind ordinarily made in the normal course of trade, but which are required to be made and kept by administrative regulation; and second, if the Fifth Amendment, in itself, affords no protection, whether Section 202 (g) of the Emergency Price Control Act extends immunity to such case.

The privilege against self-incrimination as protected by the Fifth Amendment extends to books, papers and other records, as well as to oral testimony. See *Boyd vs. United States,* 116 U. S. 616. The principal contention urged by the government on this appeal, however, is that the protection otherwise afforded is destroyed if the books and records have been required to be kept in accordance with law so that it cannot be said that such records are truly private records.

In *Wilson vs. United States,* 221 U. S. 361, upon which great reliance is placed by the government, this Court held that a corporate officer called upon to produce corporate books and records could not claim protection under the Fifth Amendment. This was on the theory that such officer was merely the custodian of them. It is true that in the opinion, Mr. Justice Hughes referred to public records kept

by public officials and records required by law to be kept by individuals as being beyond the constitutional protection, but such reference does not compel the application of the doctrine, even if one accepts the doctrine, to the extent herein suggested by the government. Moreover, such statements were but dicta and unnecessary to the decision and, while admittedly accepted by some lower courts, has never been adopted by this Court.

The public records doctrine, as enunciated in the *Wilson* case, is predicated upon the theory that one who engages in a regulated and controlled business, such as the drug and liquor business, in which there is a statutory requirement that certain records be kept, voluntarily waives his privileges against self-incrimination by the acceptance of the license to engage in such regulated business. These records assume the character of public records on the stated ground that by virtue of their nature, an individual "in assuming their custody (he) has accepted the incident obligation to permit inspection."

The Emergency Price Control Act, on the other hand, did not have for its purpose the regulation or control of any particular business, peculiarly subject to governmental control, but had rather the purpose of controlling the general economy of the entire country during a period of national crisis by the establishment of price control. In accordance with this purpose, price control became universal and was applied to practically every commodity and made applicable to practically every business, whether large or small in size, simple or complex in organization. One of the powers given the Administrator was the power to require "*any* person who is engaged in the business of dealing with *any* commodity * * * to make and keep records and * * * by subpoena require any such person to appear and testify, or to appear and produce documents, or both, at any designated place." It thus appears that Congress did not, as a condition of doing

business, require an individual to keep and produce records for the purpose of regulating in the public interest that particular business, but rather gave to the Administrator of the Office of Price Administration the right, by regulation, to require the keeping of records in order to assist him in establishing price control. American business, under the Emergency Price Control Act, was not a regulated business in the sense necessary to render records required to be kept, public records within the meaning of the *Wilson* case.

To sustain the government's position would be to permit Congress, by legislation, to destroy constitutional safeguards. This Court has held this to be beyond Congressional power. See *Counselman vs. Hitchcock,* 142 U. S. 547. By one broad regulation, by a sweep of his pen, the Administrator, under the powers vested in him, could render all records of every type and description, of all businesses, quasi-public by a mere directive that such records "be made and kept", thereby directly and completely destroying the protection of the Fifth Amendment insofar as applicable to what would otherwise be private records of an individual businessman. Thus stated in its broadest aspect, the heart of the problem herein involved is presented. Perhaps the fear of the consequence of such a decision in favor of the government is what prompted Judge Learned Hand to make the following observation in *United States vs. Davis,* 151 F. 2nd. 140, 142, affirmed, 328 U. S. 582:

> "• • • moreover the rationale, (of some of the decided cases) has always been that, when it has become necessary to regulate a business in the public interest, those who continue in it thereafter must be taken to have assented to the conditions imposed. The consequences of this theory are indeed far-reaching; it is becoming more and more usual to regulate businesses in cases of public emergency, a phrase which is confessedly exceedingly elastic. If any person already engaged

in such a business must choose between abandoning his calling, or consenting to the surrender of his privilege against self-incrimination, when the regulations provide for inspection, the scope of the privilege is considerably circumscribed."

In the same case Judge Frank, concurring, stated that "it is fairly obvious that in the future many businesses will be subject to governmental inspection under constitutionally valid statutes. The complications of our modern industrial era make such inspection often socially desirable despite its irksomeness. To augment such irksomeness by coupling it * * * with the loss of a fundamental constitutional right would be to build up popular resistance to needed governmental action."

The privilege against self-incrimination is a fundamental, basic right of an individual equally as important—if not as broad in scope, perhaps—as the right of the government to regulate and control business in the public interest. To obtain, by implication, waivers of a constitutional protection as a condition of engaging in a public regulated and licensed business, which is the extent suggested by the doctrine set forth in the *Wilson* case, which Appellee does not concede to be the law, is one thing; it is a far different thing to impose upon every businessman under a price control statute, a loss of his constitutional protection to be safeguarded in his books, papers and records, by empowering a single government official by mere regulation to turn such books and records into public records. The mere statement of this latter proposition seems sufficient to demonstrate that our constitutional guarantees are grounded upon sterner and more substantial rock than this. To follow this argument to its logical conclusion, the protection of the Fifth Amednment can be made to depend, in the circumstance of the present case, upon the desires of one single individual, the Administrator.

That the keeping and inspection of a businessman's records might aid in the enforcement of price control, as the government argues, does not justify the destruction of the protection. As Mr. Justice Brandeis stated in his dissent filed in *Olmstead vs. United States*, 277 U. S. 438, 479: "And it is also immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." Recent decisions of this Court in criminal cases too numerous and well known to cite, clearly demonstrate the principle that law enforcement, no matter how salutary, must yield to constitutional safeguards.

Carefully analyzed, the power given the Administrator falls within the condemnation of *Boyd vs. United States*, 116 U. S. 616. The power to require the keeping and production of *customary* and *usual* records by an individual in the case of price control, certainly can be no more valid than a statute requiring a person to produce his records when required for purposes of collecting revenue. The statute involved in the *Boyd* case provided that in all suits arising under the Revenue laws, the government attorney, by motion made to the court, could obtain inspection of any business book, invoice or paper belonging to the individual, and upon failure or refusal to produce such book, invoice or paper, the allegations made by government counsel of the facts which he expected to prove by such records, should be taken as confessed. This statute was held to be violative of the Fifth Amendment. Can it not be argued that a statute requiring the production of records in a court of law renders such records just as public, if at all, as a regulation requiring a record to be kept for purposes of inspection by an administrative official, as in

the Emergency Price Control Act, particularly where the records required to be kept include *all* records which the individual would ordinarily keep in the regular course of his business? To say, as the government does, that in one case the records remain private and secure under the Fifth Amendment, and in the other, they become public and beyond the protection of the Fifth Amendment, is to render our constitutional safeguards insubstantial and a sham. There is no room for valid distinction. To distinguish is to say that government power and autocracy, delegated to administrative subordinates, can override individual fundamental rights and privileges. As Justice Bradley said in the *Boyd* case, the compulsory production of a person's books and papers, to convict him of crime, is contrary to the principles of a free government. "It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom."

In this respect, it is interesting and important to note that the Internal Revenue regulations, made by and pursuant to authority vested in the Commissioner of Internal Revenue, require taxpayers to keep books and records. See Regulation 111, Section 29.54-1. Section 2707 of the Internal Revenue Code imposes a penalty for failure to keep records required to be kept by the Commissioner. Although the problem was presented to this court in *United States vs. Murdock*, 284 U. S. 141, wherein the taxpayer was required to produce his records as against a claim of self-incrimination, no suggestion was made that the taxpayer's private records and papers were, by reason of the regulations, converted into public records and thereby placed beyond the protection of the Fifth Amendment. See *Steinberg vs. United States*, 14 F. 2nd 568 (2nd Cir.).

In *Davis vs. United States*, 328 U. S. 582, this Court stated, in effect, that ration coupons, although in the possession of a private individual, nevertheless were prop-

erty of the United States. Accordingly, it has been held that a theft of such coupons constitutes larceny from the United States. *Lotto vs. United States*, 157 F. 2nd 623 (8th Cir.). Things such as ration coupons are truly public records and as such would and perhaps should be subject to compulsory production because they are merely in the temporary custody of a private citizen. They are distinguishable, however, from business records, otherwise private, required to be kept. This distinction is clearly pointed out in the recent case of *Freeman vs. United States*, 160 F. 2nd 72 (9th Cir.) as follows:

> "Quasi-public records, not instrumentalities of a crime, may not be taken by government agents as an incident to a lawful arrest. They may be had only by consent or under lawful process such as a search warrant or subpoena *duces tecum*. There is a salutary reason for such a rule. Had a subpoena been issued for these documents Appellant would have had the opportunity to challenge its validity and, if he obeyed it, to gain immunity from later criminal prosecution, based on testimony produced under compulsion of such a subpoena". (Citing Section 202 (g) of the Emergency Price Control Act).

It is submitted, therefore, that the broad dictum of the Court in the *Wilson* case should not be followed but rather should be clearly circumscribed to the extent, at least, of excluding from the public records doctrine, records required of the nature involved in this case. Appellee does not contend that Congress is without authority to require the keeping of records, as an incident to the exercise of its powers, but merely that such requirement cannot work, under the circumstance of the present case, to the constitutional detriment of an individual. See *Ryan vs. Amazon Petroleum Corporation*, 71 F. 2nd 1 (5th Cir.), rev'd. on other ground, 293 U. S. 388. There the Court held that a producer of oil could be required, under the National Industrial Recovery Act, to keep and permit inspection of records although he did not operate under any right

or license derived from the Federal government; because the government had a right to know about conditions in the oil business just as it has a right to know what a citizen's income is so that it may be taxed. Presumably, the Court said, no crime has been committed by producer or taxpayer. "But if he has committed a crime and is entitled to withhold evidence of it, he should at the proper time and on the specific ground that disclosure would tend to incriminate him, assert the right to withhold the particular evidence." See also the observations of Mr. Justice Murphy in *Okla. Press Publishing Company vs. Walling*, 327 U. S. 186, 218.

Referring specifically to Section 202 (g) of the Emergency Price Control Act, a proper interpretation of the language of that Section compels acceptance of the decision of Justice Holtzoff in the court below. Section 202 is clear and unambiguous. By its terms the Administrator of the Office of Price Administration is invested with broad authority to command inspection and production of books and records. Section 202 (b) authorizes him to require any person dealing in any commodity "to make and keep records and other documents, and to make reports", and gives him the power to require, by subpoena, any person to appear and testify *or* to appear and produce documents. Under Section 202 (e) he may invoke the assistance of a District Court to compel compliance with his subpoena. Section 202 (g) provides that no person shall be excused from complying with *any requirements* under Section 202, because of his privilege agains self-incrimination but makes applicable to "any individual, specifically claiming such privilege the 'immunity provisions' of the Compulsory Testimony Act of 1893". Necessarily included within the protection of Section 202 (g) is the production of records required to be kept by the Administrator under the authority of that Section. The language clearly requires the keeping of records, when ordered, but grants immunity

in the event they are subpoenaed and the privilege is claimed. See report of Senate Committee on Banking and Currency, SEN. REP. No. 931 (1942), p. 21. The object of the requirement of the keeping and inspecting of records, was obviously to provide the Administrator with data so that price schedules and regulations could be formulated with respect to the various industries and businesses. The obvious purpose was information and not prosecution. The fact that reports and records are required will necessarily tend to prevent a crime that would be disclosed thereby, but if such a crime was disclosed, the privilege against self-incrimination could be invoked. See *Ryan vs. Amazon Petroleum Corporation*, 71 F. 2nd 1, 8 (5th Cir.). See also *Freeman vs. United States*, 160 F. 2nd 72 (9th Cir.). Compare *Spevak vs. United States*, 158 F. 2nd 594, 597 (4th Cir.).

Congress, having given to the Administrator express authority to require the keeping of records, without limitation, and in the same Section having granted immunity to one claiming his privilege against self-incrimination, must be conclusively presumed to have deliberately intended to include within the broad term "any requirements under this Section", records required by the Administrator to be kept. To limit Section 202 (g) under the public records doctrine, would be to usurp the legislative power and write into the Act something which is not there.

There is nothing inconsistent in granting immunity to one who produces books and records required by law to be kept. The Compulsory Testimony Act of 1893, incorporated into Section 202 (g), specifically extends immunity to one required to produce "books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission", 49 U. S. C. A. Sec. 46. Section 6 of the Interstate Commerce Act (49 U. S. C. A. § 6) specifically provides for the keeping and filing of certain records, and particularly tariffs, which as indicated above,

is by name included in the types of documents falling within the Compulsory Testimony Act; so that it cannot be said, as the government now contends, based upon dictum in the *Wilson* case, that the immunity provision of the Compulsory Testimony Act does not cover quasi-public records.

There is nothing to the contrary in *Heike vs. United States*, 227 U. S. 131. There, Mr. Justice Holmes decided only that the Fifth Amendment did not justify a claim of privilege against prosecution for crimes with which the matters testified thereto were but remotely connected, and consequently, the immunity afforded by the Act of February 25, 1903, 15 U. S. C. A. Section 32, should not be construed to reach them. That case too involved a corporation. The public records doctrine was not involved.

To sustain the government's contention would render Section 202 (g) of the Emergency Price Control Act meaningless for the Administrator could by mere regulation destroy its applicability to all matters other than verbal testimony. In the present case, the uncontroverted affidavit of Appellee (R-9) stated that the records which were produced in response to the subpoena were kept in the normal course of trade or business, although they were required to be kept by order of the Administrator. Under such circumstance, if these are considered public records, there could be no such thing as a private record. They involve the ordinary, regular business entries. To hold these records to be beyond the protection of Section 202 (g) would destroy completely the intended immunity therein provided. This cannot be under the authority of *Counselman vs. Hitchcock*, 142 U. S. 547. What Mr. Justice Brown said in *Hale vs. Henkel*, 201 U. S. 43, is extremely pertinent to the present case, involving an act as broad and as inclusive as the Emergency Price Control Act. He there said:

"we are of the opinion that there is a clear distinction in this particular between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the state. The individual may stand upon his constitutional rights as a citizen. He is entitled to carry on his private business in his own way. His power to contract is unlimited. He owes no duty to the state or to his neighbors to divulge his business, or to open his doors to an investigation, so far as it may tend to criminate him. He owes no such duty to the state, since he receives nothing therefrom, beyond the protection of his life and property. His rights are such as existed by the law of the land long antecedent to the organization of the state, and can only be taken from him by due process of law, and in accordance with the Constitution. Among his rights are a refusal to incriminate himself, and the immunity of himself and his property from arrest or seizure except under a warrant of the law. He owes nothing to the public so long as he does not trespass upon their rights."

As argued in the brief filed on behalf of the petitioner in *Shapiro vs. United States*, No. 49, to be argued immediately preceding this case, Section 202 (g) was never intended to restrict the grant of immunity to oral testimony; for the Administrator may not only compel a person to appear and testify, but also to *appear and produce* documents, without oral testimony. The language in the Section is thus in the alternative. Needless to say, if as the government contends, the mere order of the Administrator that all customary records of an individual shall be kept and maintained for purposes of inspection and production, and if as a consequence such records would become public records, so that production of them could be compelled without a grant of immunity, there would be absolutely no protection to the individual under Section 202 (g), because in most cases oral testimony would be unnecessary. The statute should be construed to avoid the possibility of such facile circumvention.

Law enforcement, while important to the general welfare, should not be the basis for sacrificing what is equally important, namely, an individual's constitutional rights granted to him for the express purpose of safeguarding him against over-zealous law enforcement officers and improper methods of prosecution. As Mr. Justice Murphy, speaking for the court in the *United States vs. White*, 322 U. S. 694, 698, said "The immediate and potential evils of compulsory self-disclosure transcend any difficulties that the exercise of the privilege may impose on society in the detection of crime. While the privilege is subject to abuse and misuse, it is firmly embedded in our constitutional and legal frameworks as bulwark against iniquitous methods of prosecution."

In this day of increasing governmental regulation with its incidental but provocative invasion of the individual's privacy, courts should be alert to the danger of delimiting his protective rights and privileges. Price control is at an end. As such, the immediate problem here presented is important, in the narrow sense, only to the individuals involved. In the broader sense, however, the principles which this Court will lay down in this and the *Shapiro* cases, will be extremely far-reaching, and will directly affect the personal security of every member of society as against government intrusion. The protection afforded by the Fifth Amendment should not be circumscribed as the government demands. To repeat the warning of Judge Frank in the *Davis* case, *supra*, to destroy by judicial decision the fundamental constitutional right herein involved, would be to build up popular resistance to needed governmental action. It is submitted, therefore, that the judgment of the lower court on the merits of the motion to dismiss should be affirmed.

The government has raised in its brief, for the first time anywhere in this case, the point that it does not appear from the record that Appellee was sworn and

produced the records under oath. There are several answers to this.

In the first place, the government is urging this for the first time in this Court and it appears to be an afterthought. The case was heard in the court below on the single general issue of whether records required to be kept and which were produced in response to a subpoena were such as were entitled to immunity under Section 202 (g). Counsel appointed by the lower court did not contend that the records were not produced under oath. As appears from the transcript of record, one of such counsel was the very same person before whom the Appellee appeared for hearings at the Office of Price Administration at which time he produced his records. He certainly would have raised the point now advanced, if the same had merit.

In the second place, it is submitted that the government is in error when it states that it does not appear from the record that Appellee was sworn when he produced his records. The uncontroverted affidavit, filed in support of the motion to dismiss (R-9) states that the Appellee was subpoenaed to appear at the Office of Price Administration "to testify" and "to bring with him any and all records required" by the regulations; that Appellee did orally claim immunity; that notwithstanding this claim "the presiding officer at said hearing * * * did receive the records produced in response to the subpoena". This affidavit, it is submitted, is sufficient proof that Appellee was under oath in the absence of any proof to the contrary.

In the third place, Section 202 (g) of the Emergency Price Control Act does not require that a person claiming immunity must do so under oath. Congress in Section 202 (g) refers specifically to the Compulsory Testimony Act of February 11, 1893 which does not require an oath. It made no reference to any amendments to that Act, and particularly, to the Amendatory Act adopted June 30, 1906,

49 U. S. C. A., Section 48, which limited the immunity granted to natural persons who produce records under oath. It must be presumed that Congress in referring specifically to the Act of February 11, 1893, without reference to its amendments, did so deliberately and with full knowledge of the existence of the Act of 1906 and with the intention to exclude the latter Act from the Section. This is fortified by the fact that Section 202 (g) provides that the *immunity provisions* of the Act of 1893 shall apply with respect "to any individual" (part of the 1906 amendment) who specifically claims the privilege. To insert the additional requirement that the claim be under oath would be to amend Section 202 (g). As this Court said in *United States vs. Monia,* 317 U. S. 424, "It is not for us to add to the legislation what Congress pretermitted". Moreover, Section 202 (g) does not incorporate all of the Compulsory Testimony Act of February 11, 1893, but provides simply that the "immunity provisions" of that Act shall apply to any individual claiming a privilege.

Furthermore, there appears to be good and sound reason why Congress did not require that the production be under oath. The Administrator is not required to administer an oath but may do so or not as he chooses. See Section 202 (b). The Administrator may require an individual to appear and give testimony, or simply to appear and produce documents, or both, as in the present case. See Sections 202 (b) (e). Thus, obviously, the Administrator, while having the power to require the production of records without the taking of testimony and without the necessity for administering an oath, may circumvent Section 202 (g), if the provisions of the Act of 1906 are to be deemed part of that Section, as the government contends. The jeopardy of the individual being great, Congress must be presumed to have intended otherwise.

For all of the foregoing reasons, it is submitted that the government's position with respect to the state of the record and the requirement of an oath, is without merit.

II

The Appeal Should Be Dismissed

The appeal in the present case was not properly taken. The point herein involved is discussed by the Appellant in Footnote 2 on page 7 of its brief. In the United States Court of Appeals, Appellee urged that the appeal in the present case was filed in that court improperly and without authority (R-36). Counsel in the District Court were appointed by that court to prosecute the rule to show cause issued upon the complaint of the Administrator of the Office of Price Administration. Upon motion of the Appellee, the District Court dismissed its rule to show cause (R-30), after which an appeal was filed by the same attorneys originally appointed by the District Court. Appellee now contends, as it did in the Court of Appeals, that the appeal was not properly taken by the United States, not only for the reason that it is questionable whether the United States was a formal party to the action in the District Court, (*cf. United States ex rel W. Va. Pitts. Coal Co. vs. Bittner*, 11 F. 2nd 93 (4th Cir.)) as it certainly would have been if the proceeding had been by way of information, (*United States vs. Goldman*, 227 U. S. 229) rather than by complaint and rule to show cause, but for the additional reason that the appeal was prosecuted without authority by the attorneys appointed by the court.

It is a general rule that an attorney cannot, on his own motion, appeal from a judgment injuriously affecting the interests of a client without that client's consent. The authority of attorneys to represent parties in an original suit is at an end when the first judgment is rendered. *Brown vs. Grand Trunk Western Railway Co.*, 124 F. 2nd 1016 (6th Cir.). An argument to the effect that an attorney can appeal from an order entered by the same judge who appointed him and still maintain his authority to proceed is difficult to follow. The power of attorney must terminate upon the rendition of the judgment.

Furthermore, Appellee contends that all litigation involving the United States, criminal as well as civil, and particularly in appellate courts, is under the control and direction of the Attorney General. See *United States vs. San Jacinto Tin Co.*, 125 U. S. 274; *Sutherland vs. International Insurance Company of New York*, 43 F. 2nd 969 (2nd Cir.).

The Department of Justice did not enter this case until after briefs had been filed and the case set for argument, when the Acting Solicitor General moved the lower court to certify the case to this Court. This was more than five months after the date of appeal (R-30, 32). Appellee challenged the appeal on the ground that in the absence of a warrant of attorney authorizing the filing of the appeal in the present case by the Attorney General, a dismissal should be entered (R-37). Appellee does not believe that the intervention by the Solicitor General in the case five months after notice of appeal can justify an appeal theretofore taken without authority.

Appellee has found no case wherein the present problem has been presented, but is of the opinion that upon dismissal by a District Court of a rule to show cause in a contempt proceeding, the power of attorneys appointed by the very court passing on the rule should be limited. It is submitted therefore that the appeal should be dismissed.

CONCLUSION

It is respectfully submitted that the order of the District Court should be affirmed.

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SUPREME COURT OF THE UNITED STATES

No. 97.—October Term, 1947.

The United States of America, Appellant, v. James Hoffman.	Appeal From the District Court of the United States for the District of Columbia.

[June 21, 1948.]

Mr. Chief Justice Vinson delivered the opinion of the Court.

On Feb. 27, 1946, the Price Administrator filed a petition, in the District Court for the District of Columbia, to institute criminal contempt proceedings against appellee. The petition charged appellee with having made numerous sales of used cars at over-ceiling prices in violation of an injunction previously issued by the District Court. A rule to show cause was issued, but was dismissed on motion of the appellee, on the ground that he was entitled to immunity under § 202 (g) of the Emergency Price Control Act from prosecution for the transactions upon which the petition was founded. 68 F. Supp. 53.

The Government brought this appeal, under the provisions of the Criminal Appeals Act,[1] to review the decision of the District Court. The main issue is the same as that presented in the companion case, *Shapiro* v. *United States*, *ante* p. —, but two additional minor questions are raised:

1. Appellee urges that the appeal was not properly taken by the United States because the Government was not a party to the proceedings in the District Court. The

[1] 34 Stat. 1246, as amended by 56 Stat. 271, 18 U. S. C. Supp. V, § 682, and by § 238 of the Judicial Code as amended, 28 U. S. C. § 345.

record shows, however, that the litigation was instituted in that court by a petition of the OPA District Enforcement Attorney on behalf of the Price Administrator. When the rule to show cause was issued, the court appointed the United States Attorney and the OPA District Enforcement Attorney as "attorneys to prosecute the criminal charges contained in the petition filed herein on behalf of the Court and of the United States." See Rule 42 (b) of the Rules of Criminal Procedure, 327 U. S. 865–66. Thus the United States was, in any relevant sense, a party to the proceedings, and the appeal was properly brought under the Criminal Appeals Act. See *United States* v. *Goldman*, 277 U. S. 229, 235 (1928); *Ex parte Grossman*, 267 U. S. 87, 115 *et seq.* (1925).

2. The Government mentions a further consideration, not involved in the *Shapiro* case. The record does not state that the appellee was sworn and produced the records under oath, a condition precedent to the attainment of immunity under a 1906 Amendment, 49 U. S. C. § 48, to the Compulsory Testimony Act of 1893. It is unnecessary to consider this contention both because it does not appear to have been duly raised in the court below, and because the grounds considered and the views set forth in our opinion in the *Shapiro* case suffice to dispose of this appeal.

The decision of the District Court is reversed and the case remanded for further proceedings.

Reversed.

MR. JUSTICE FRANKFURTER dissents for the reasons stated in his dissenting opinion in *Shapiro* v. *United States*, *ante* p. —. MR. JUSTICE JACKSON and MR. JUSTICE MURPHY dissent for the reasons stated in MR. JUSTICE JACKSON's dissenting opinion in *Shapiro* v. *United States*, *ante* p. —. MR. JUSTICE RUTLEDGE dissents for the reasons stated in his dissenting opinion in *Shapiro* v. *United States*, *ante* p. —.